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SYMPOSIUM
LAW SCHOOLS AND THE LEGAL PROFESSION: A CONFERENCE IN CELEBRATION OF TWENTY-FIVE YEARS OF SERVICE BY JAMES P. WHITE

NOTES

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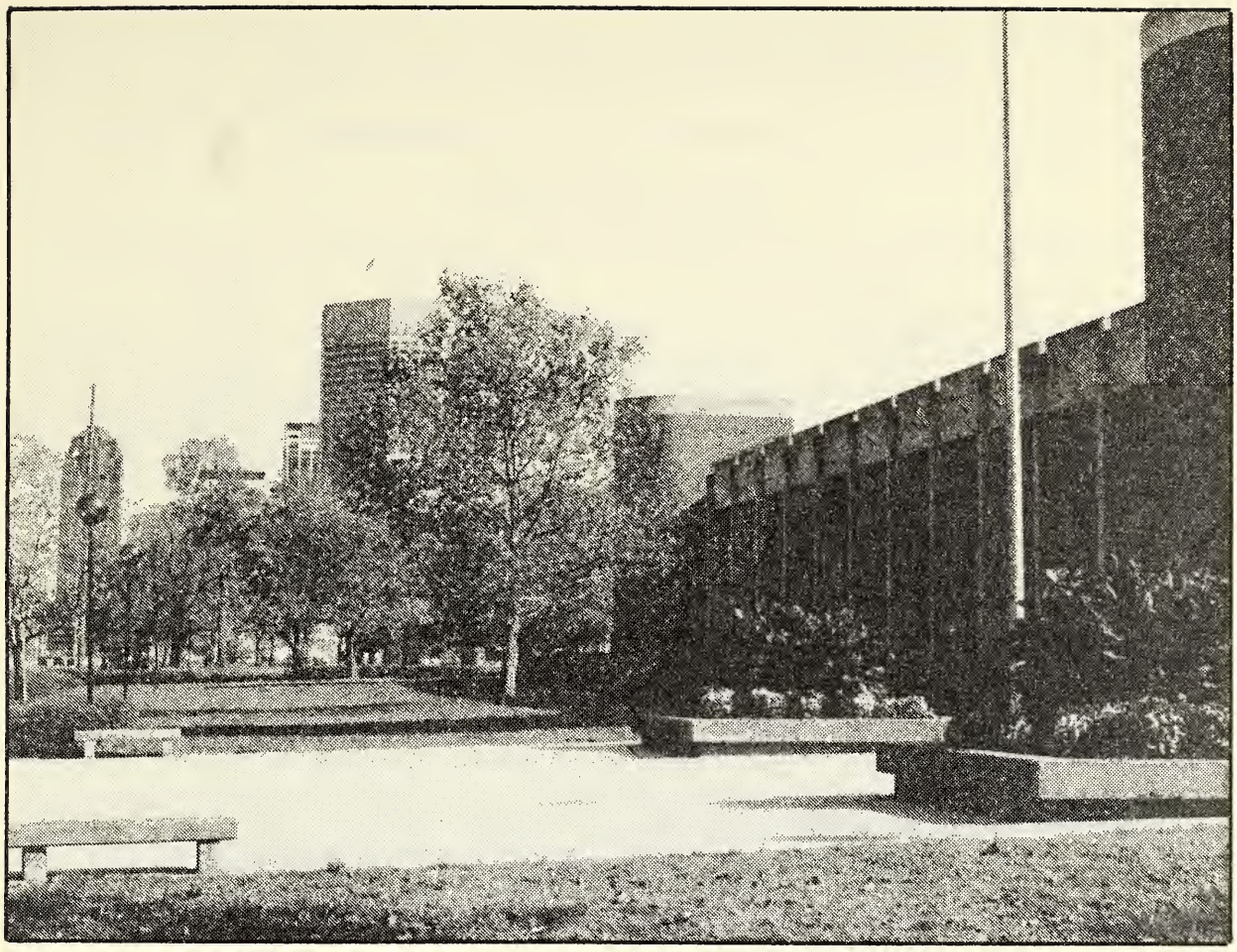

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ERRATA

In Issue Four of Volume 33 of the *Indiana Law Review,* the article *Beyond Dead Reckoning: Measures of Medical Injury Burden, Malpractice Litigation, and Alternative Compensation Models from Utah and Colorado* appeared, authored by David M. Studdert, Troyen A. Brennan and Eric J. Thomas. At the conclusion of the article, the authors presented several tables. Proper attribution for each of the tables was erroneously omitted. In addition, a row of data in Table 6 reporting cost information from Utah was excluded. The *Indiana Law Review* wishes to apologize to its readers and to the authors for these inaccuracies.

Table 6 is re-printed in its entirety to show complete data. Portions of the data reported in Tables 1-7 originally appeared in the following publications:

Table 1. Eric J. Thomas et al., *Incidence and Risk Factors for Adverse Events and Negligent Care in Utah and Colorado in 1992*, 38 MED. CARE 261 (2000).

Tables 2-4. David M. Studdert et al., *Negligent Care and Malpractice Claiming Behavior in Utah and Colorado*, 38 MED. CARE 250 (2000).

Table 5. Eric J. Thomas et al., *Costs of Medical Injuries in Colorado and Utah in 1992*, 36 INQUIRY 255 (1999).

Tables 6-7. David M. Studdert et al., *Can the United States Afford a "No-Fault" System of Compensation for Medical Injury?*, 60 LAW & CONTEMP. PROBS. 1, 31 (1997).

TABLE 6.
AFFORDABILITY OF PREFERRED NO-FAULT MODELS IN UTAH AND COLORADO (MILLIONS, DISCOUNTED TO 1992 DOLLARS)

State	Estimates of Preferred No-Fault Models	Current Malpractice System Costs
Utah	$ 54.9 *	$ 55-60
Colorado	$ 82.0 †	$ 100-110

* Based on use of Swedish compensable events; health care costs; $100,000 cap on pain and suffering; four week disability period; no household production; 66% wage replacement.

† Based on use of Swedish compensable events; health care costs; pain and suffering; eight-week disability period; no household production; full wage replacement.

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SYMPOSIUM

FOREWORD

JAMES P. WHITE*

The intent of the Symposium committee was to produce a series of papers discussing the relationship of legal education to the legal profession, both reflecting upon the past twenty-six years during which I served as Consultant on Legal Education to the American Bar Association (ABA), and looking forward to the future of legal education and the legal profession.

The role of the Consultant on Legal Education to the ABA, and that of the staff of the Consultant's Office, is to effectively administer the accreditation of law schools project of the ABA and to provide service, information and consultation to the ABA, to bar admitting authorities, and to law schools relating to legal education in the United States. The ABA, through its Section of Legal Education and Admissions to the Bar (the Section) and through the Consultant on Legal Education to the ABA, is the national law school accrediting agency as recognized by the United States Department of Education.

The Consultant represents the ABA and the Section at significant legal education functions and meetings of various legal and higher education organizations, and provides information and counsel to law schools, their deans and faculties regarding accreditation. The Consultant interacts with the Conference of Chief Justices and the National Conference of Bar Examiners on behalf of the ABA and the Section, and is responsible for legal education outreach, both nationally and internationally.

In part the Symposium reflected upon law schools of twenty-five years ago and those of today, looking to law schools in the new Century.

Many changes in law schools and American legal education have occurred during the past twenty-five years. Smaller classes, new forms of instruction including increased interdisciplinary courses, growth of clinical education and of legal writing and increased emphasis on ethics have occurred. The composition of the student body and the faculty have significantly changed and continues to change. Law libraries now, together with the rest of the law school, make use of the latest technology. The growth area in legal education is in advanced degree programs, now offered by over one-half of the ABA approved

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law schools on a wide range of subject matter and increasingly for foreign trained lawyers. The curricular offerings of law schools have exploded. All of these factors have caused faculty growth and expansion. The internationalization of the curriculum and the ability of American students to study abroad is astounding. The support staff for a law school now includes recruitment, financial aid, student counseling, placement, alumni relations, development, technology support and pro bono activities. All of these developments make the American legal education a recognized model throughout the world.

After welcoming remarks by Dean Robert K. Walsh, Chairperson of the Section of Legal Education and Admissions to the Bar of the ABA, Martha Walters Barnett, President-Elect of the ABA and Dean Norman Lefstein of the Indiana University School of Law—Indianapolis, the Symposium program began with the topic: *What the Legal Profession Expects of Law Schools*.

The first speaker was Chief Justice Randall T. Shepard of the Indiana Supreme Court. He observed that, "[l]awyers receive most of what they expect from their school during the three years they spend as students."[1] He stated that there were five demands of the law school graduate: "Honor My Degree," "Train Good Lawyers," "Provide Useful Scholarship," "Contribute Toward Ethical Conduct," and, "Honor the Practitioners."[2] He elaborates these five demands in detail in what he suggests are the expectations of the individual law school graduate and of the organized bar.[3]

He stated that "practitioners also expect that their views will be respected in discussions about the training and continuing education of lawyers. Those who toil outside the academy are entitled to have their observations addressed on the merits. This occurs sometimes, and sometimes it does not."[4]

Responding to Chief Justice Shepard was Phillip S. Anderson, the immediate past president of the ABA. Mr. Anderson observed that the two most pressing issues facing the legal profession today are the matters of multi-disciplinary practice and multi-jurisdictional practice. The globalization of the profession and the pressures of clients for full service of their needs in every jurisdiction, both here and abroad, require that all segments of the profession, the professorate, the practicing bar and the judiciary address these two pressing issues that will affect the profession for decades to come.[5]

Also responding to Chief Justice Shepard was Robert A. Stein, Executive Director of the ABA. In response to Chief Justice Shepard's question: "What does the legal profession expect from the law schools?" Mr. Stein stated that the

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1. Randall T. Shepard, *What the Profession Expects of Law Schools*, 34 IND. L. REV. 7, 7 (2000).

2. *See id.* at 7, 9, 11-13.

3. *See id.*

4. *Id.* at 14.

5. *See* Phillip S. Anderson, Immediate Past-President, American Bar Association, Address at the Indiana University School of Law—Indianapolis Symposium, *Law Schools and the Legal Profession: A Conference in Celebration of Twenty-five Years of Service by James P. White* (Apr. 8, 2000).

legal profession expects law schools to: produce good lawyers; provide legal scholarship with a healthy balance between theory and practice; and, encourage professors who are concerned about how the law actually works to be actively involved in law reform activities.[6]

The paper presented by Professor Deborah L. Rhode of Stanford was on the topic of *Securing Professionalism and Competency: The Role of the Law Schools and the Legal Profession.*[7] She calls for a focus on preparing all law students for the challenges of modern practice and stresses the obligation of law schools to develop strategies for all law students to engage in pro bono activities.[8] She stated that legal education has a unique opportunity and corresponding obligation to make pro bono involvement a rewarding and rewarded opportunity so that students are instilled with a sense of professional responsibility for the public interest.[9]

Commenting on Professor Rhode's paper was Dean Harry J. Haynsworth of William Mitchell College of Law.[10] He began by stating:

> Professor Rhode's paper is both elegant and provocative, and I concur with most of her critique of current legal education. I disagree, however, with her conclusion that the American Bar Association ("ABA") Law School Accreditation Standards ("Standards") inhibit needed structural changes in legal education.
>
> . . . In the approximately twenty-five years I have served on ABA site evaluation teams, each law school I have inspected has unique features and customs. The differences between these law schools have been at least as striking as their similarities. Moreover, even if this criticism was accurate in the past, it clearly is not the case today.[11]

Dean Haynsworth discussed the ABA Temporary Distance Education Guidelines and his belief that they provide multiple opportunities for flexibility and innovation and that in the future pedagogically sound distance learning methodologies will be accepted by the academic community.[12]

The second day of the Symposium opened with the topic: *The Law Schools and the Profession: Working Together to Achieve Diversity.* Herma Hill Kay of the University of California-Berkeley School of Law (Boalt Hall) opened stating: "A diverse classroom is necessary to adequately prepare all law students for the practice challenges they can expect to see in their careers in the 21st

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6. *See* Robert A. Stein, *What the Legal Profession Expects of Law Schools: A Response*, 34 IND. L. REV. 15, 15 (2000).

7. *See* Deborah L. Rhode, *Legal Education: Professional Interests and Public Values*, 34 IND. L. REV. 23 (2000).

8. *See id.* at 42-45.

9. *See id.*

10. *See* Harry J. Haynsworth, *Temporary Distance Education Guidelines Provide Opportunities for Flexibility and Innovation*, 34 IND. L. REV. 47 (2000).

11. *Id.*

12. *See id.* at 54.

Century."[13]

She decried the decline in minority enrollment at most of the nation's law schools. At the University of California at Berkeley's Boalt Hall, for example, about thirty-three percent of law students were minorities in 1996.[14] But after a referendum that year banning affirmative action in admission decisions, the figure dropped to twenty percent in 1997, and has declined since.[15] And, for those inclined to think such statistics do not have an impact on their own education or practice, she pointed out that today's minorities will make up more than half of the U.S. population by the year 2040, according to government estimates.[16]

Judge Henry Ramsey, Jr., a retired California judge and former Howard University School of Law dean, denounced what he called "preemptive surrender"—the tendency of law schools to abandon affirmative action programs to avoid being sued rather than letting them be tested by the courts.[17] Ramsey reminded the conferees to focus not on what is being denied to minority students, but on what is being denied to society by excluding them from various forms of higher education.[18]

Justice Rosalie E. Wahl, a retired Justice of the Minnesota Supreme Court, then told of entering law school at middle age and becoming the first woman member of the Minnesota Supreme Court. She stressed that for law to represent all citizens, lawyers must be representative of all citizens and reflect the demographic composition of the United States. She emphasized the need of more lawyers who are persons of color and women and who are interested in serving the individual citizen. She emphasized her belief that affirmative action is necessary to make the legal profession reflective of American society. She praised the ABA's Section of Legal Education and Admissions to the Bar for its early efforts to require law schools to engage in affirmative action efforts.[19]

The final session was entitled *Legal Education in the Twenty-First Century: Predicting the Future*. Dean John Sexton of New York University Law School observed that:

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13. Herma Hill Kay, Professor, University of California—Berkeley School of Law (Boalt Hall), Address at the Indiana University School of Law—Indianapolis Symposium, *Law Schools and the Legal Profession: A Conference in Celebration of Twenty-five Years of Service by James P. White* (Apr. 8, 2000).

14. *See* Herma Hill Kay, *The Challenge to Diversity in Legal Education*, 34 IND. L. REV. 55, 65 (2000).

15. *See id.*

16. *See* Kay, *supra* note 13.

17. Henry Ramsey, Jr., *Response to Dean Herma H. Kay's Affirmative Action Paper*, 34 IND. L. REV. 87, 92 (2000).

18. *See id.*

19. *See* Honorable Rosalie Wahl, Justice of Minnesota Supreme Court (retired), Address at the Indiana University School of Law—Indianapolis Symposium, *Law Schools and the Legal Profession: A Conference in Celebration of Twenty-five Years of Service by James P. White* (Apr. 8, 2000).

> For me, the lesson is the inevitability of a diversification of legal education product, and I think that is the big backdrop for everything we discuss as we look forward in legal education. In our age, consumers drive product development. They demand product differentiated by price. These maxims, whether we want to disregard them or not, apply to legal education. Ultimately therefore, they will trump policies and rules from on high, even from the American Bar Association that are designed to preserve and protect old orders, unless those old orders can justify their existence. So, the single most important thing we have to keep in mind, I think, are in my view, the inevitability of diversification, we will see major changes in the structure and content of legal education.[20]

Responding was Susan Westerberg Prager, Provost of Dartmouth College and former Dean of UCLA Law School. Provost Prager stated that she agreed with Dean Sexton that the future portended change for the legal profession, for the demand and delivery of legal services, and for the education of the future members of the legal profession.[21] She stated that in the world of legal education it is important to maintain and nurture law schools and degree programs designed to inculcate the values of the profession and to produce graduates who will effectively serve societal needs.[22]

The program concluded with Willard L. Boyd, President Emeritus of the University of Iowa observing that while the profession and hence, law schools are changing, we must be always true to the fundamental essentials of the profession, to serve the public good.[23]

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20. John Sexton, Dean of New York University Law School, Address at the Indiana University School of Law—Indianapolis Symposium, *Law Schools and the Legal Profession: A Conference in Celebration of Twenty-five Years of Service by James P. White* (Apr. 8, 2000).

21. *See* Susan Prager, Provost of Dartmouth College, Address at the Indiana University School of Law—Indianapolis Symposium, *Law Schools and the Legal Profession: A Conference in Celebration of Twenty-five Years of Service by James P. White, Response to John Sexton, Dean of New York University Law School* (Apr. 8, 2000).

22. *See id.*

23. *See* Willard L. Boyd, President Emeritus of University of Iowa, Address at the Indiana University School of Law—Indianapolis Symposium, *Law Schools and the Legal Profession: A Conference in Celebration of Twenty-five Years of Service by James P. White, Concluding Remarks and Adjournment* (Apr. 8, 2000).

WHAT THE PROFESSION EXPECTS OF LAW SCHOOLS

RANDALL T. SHEPARD*

Most of us choose our own titles when we are invited to speak or write about law. At most, the inviter tells us what the general occasion is, and we respond by suggesting a particular piece of the day's larger topic, usually a slice of it that has already been on our minds, and a deal is struck. Occasionally, someone assigns us a topic, but we find it sufficiently large a vessel that we can pour into it pretty much what we like.

The able organizers of this symposium printed my title in the program, and that is how I learned about it. I am glad they did so. Thinking through the title, "What the Legal Profession Expects of Law Schools," has been an interesting experience.

For one thing, the demands of law practice are such that most members of the profession do not actually expect anything at all from their law schools once they have graduated. Lawyers receive most of what they expect from their school during the three years they spend as students. By and large, they take their diploma and seldom give the matter another thought.

On the other hand, the organs and institutions of the profession, such as the bar associations and the courts, and those individual lawyers who pay close attention to legal education and admissions to the bar, actually do form and articulate discrete expectations with respect to the schools. These expectations, of course, are shifting and often conflicting.

In thinking about both the modest expectations of the great bulk of lawyers and the specific expectations of the organization, I have come to rest on five enumerated demands. I list them here, in no particular order, and specifically disclaim any authority or presumption to speak for the profession.

I. HONOR MY DEGREE

I begin with an expectation that I think actually does hold relatively wide sway in the world of working lawyers. It might be the lawyer's twist on a rule prevailing among our physician cousins: "Do no harm to my credential."

In many ways, the career of a law graduate and the career of the graduate's school are intertwined. This intertwining bears some resemblance to the relationship between the careers of judges and their law clerks, described by one appellate judge like this:

> Judge and law clerk are in fact tethered together by an invisible cord for the rest of their mutual careers. The judge will forever appear on the clerk's resume as his first permanent professional employer; she will receive many inquiries about the clerk's performance and character. The law clerk is the judge's emissary to the world; although sworn to secrecy about the court's substantive work, clerks often comment, expressly or by knit of the brow, about the character, work habits, fairness and

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* Chief Justice of Indiana. A.B., 1969, Princeton University; J.D., 1972, Yale Law School; LL.M., 1995, University of Virginia.

> generosity of the judges they clerked for. Mutual trust and respect are not merely desirable, they are essential.[1]

For purposes of this first expectation, then, one might observe that the school shows itself to the world in the person of its graduates, and certainly the reputation of schools is affected by the performance of its alumni as practitioners. One need look no further than the alumni publications of American law schools to see that most schools believe that the more illustrious their alumni are, the more illustrious will be the reputation of the school.

What is not so obvious is that there is a connection between school and graduate that flows in the opposite direction. A law school graduate often associates his or her own standing in the legal community with the status of the graduate's alma mater. Those graduates whose institutions are rising stars stand a little taller when they go to the bar meetings. This is among the reasons why law practitioners take interest in and are more tolerant of the *U.S. News and World Report* law school rankings than practicing academics.[2] Another reason is that they do not feel the pain inflicted by the rankings in the same way academics do.

Anyway, this chance to move modestly upwards in life along with one's school plays some role in leading graduates to contribute to the success of the alma mater. The new building campaign, the new professorship, or the new lecture series, to name a few building blocks of thriving schools, are all things that likely enhance the value of the ticket which the graduate has received from the school.

This saga in which America's lawyers find greater fulfillment through the world of higher education has run for more than a century. Lawyers and bar associations spent several decades attempting to transfer the training of lawyers from the Nineteenth Century system of reading the law to the present system of university education, believing in part that a trade that required a post-graduate degree in a seat of higher learning would always be thought a more noble or important one.[3] This burnishing of the trade and its schools began ever so

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1. Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1709 (1991).

2. When *U.S. News & World Report* first published its annual ranking of law schools in 1987, a "shock wave" echoed through the legal community. Frank T. Read, *Legal Education's Holy War Over Regulation of Consumer Information: The Federal Trump Card*, 30 WAKE FOREST L. REV. 307, 307 (1995). One hundred fifty law school deans signed a letter criticizing the survey, while numerous deans and law professors wrote in opposition to the rankings. *See* M.A. Stapleton, *Push Is on for Unranked Guides to Schools*, CHI. DAILY L. BULL., Jan. 10, 1997, at 3; Nancy B. Rapoport, *Ratings, Not Rankings: Why* U.S. News & World Report *Shouldn't Want to Be Compared to* Time *and* Newsweek*—or the* New Yorker, 60 OHIO ST. L.J. 1097 (1999). An article in the ABA Journal referred to the legal education community's opposition to the survey as having "taken on the force of a jihad." Terry Carter, *Rankled by the Rankings*, A.B.A. J., Mar. 1998, at 46. *See also* Jane E. Bahls, *Pinning Down the Best: Ranking Law Schools Is a Free For All*, STUDENT LAW, Mar. 1991, at 14 (discussing educators' general opposition to law school rankings).

3. Students who attended law school "during the first century of legal education in the

modestly, for when AALS established its first membership requirements in 1901, it elected to admit only schools that limited admission to high school graduates.

Our trade has come a long way since then, and lawyers expect we can go further yet. Thus, one of their expectations is that their schools will manage their own affairs so that people will say, "Ah!", when we tell them where we went to law school.

II. TRAIN GOOD LAWYERS

Probably more important on the list of expectations is producing regular crops of able new attorneys. This affects the day-to-day work of practitioners both as professionals and as business owners. This expectation is central to the debate of the last few decades about professional skills education, or lack thereof, in the schools.[4] Back when practitioners carried the entire burden of training new associates, they had no one to complain about if the mission failed. Having turned training over to full-time academics, however, the practitioners now regularly dun the schools to do a better job of it.[5]

Practitioners who are critics on this topic have the sense that overemphasis by the schools on matters arcane to the daily life of lawyering has made it more difficult to integrate new lawyers into that work-a-day world. Accordingly, they

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United States received a very broad education," including the study of government generally. The prevailing view at the time was that legal education should serve both future practitioners and those who did not intend to be lawyers. Robert A. Stein, *The Future of Legal Education*, 75 MINN. L. REV. 945, 947 (1991). By the latter half of the Nineteenth Century, changes had occurred which shifted legal education to reflect a more narrow "professional model." *Id.* at 948.

4. The debate between the practitioner and the academy on this point was highlighted by the "MacCrate Report," a section report of the American Bar Association's Task Force on Law Schools and the Profession, chaired by former ABA President Robert MacCrate. *See* SEC. ON LEGAL EDUC. AND ADMISSIONS TO THE B., A.B.A., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, 1992) [hereinafter MACCRATE REPORT]. Many academics criticized the MacCrate Report, asserting that its authors failed to consider current law school practices. *See, e.g.*, John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157 (1993); Richard A. Matasar, *The MacCrate Report from the Dean's Perspective*, 1 CLINICAL L. REV. 457 (1994); Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593 (1994); Laura F. Rothstein, *The Affirmative Action Debate in Legal Education and the Legal Profession: Lessons from Disability Discrimination Law*, 2 J. GENDER, RACE & JUST. 1, 9 (1998) ("The MacCrate Report . . . only begins to address what the mission of legal education should be.").

5. *See, e.g.*, Kathy Biehl, *Things They Didn't Teach in Law School*, A.B.A. J., Jan. 1989, at 52, 52-55; Harry T. Edwards, *The Role of Legal Education in Shaping the Profession*, 38 J. LEGAL EDUC. 285 (1988); Stephanie Benson Goldberg et al., *Bridging the Gap: Can Educators and Practitioners Agree on the Role of Law Schools in Shaping Professionals? Yes and No*, A.B.A. J., Sept. 1990, at 44, 44-50; Donald H.J. Hermann, *Who Teaches Billing 101*, NAT'L L.J., Nov. 12, 1990, at 13.

have taken a high level of interest in the skills movement that has been a matter of such debate in the academy.

Essentially, practitioners seek law graduates who have a basic jurisprudential foundation and as much of a start as possible in acquiring and refining skills in writing and oral communication that are so central to the lawyer's work. I do not plan to spend much time here at the chore of sorting out claim and counterclaim on the subject. Suffice it to say that I take two complementary responses by the schools as respectable replies: that there has been a dramatic increase in commitment to skills education and that practitioners themselves have committed fewer resources to training as time wears on.

On a more elevating level, the profession expects that schools will provide the legal community and society as a whole with fine new leaders. This expectation is perhaps one of the most important emerging issues in legal education and the profession.

The dramatic decline in law school applicants throughout the 1990s has caused dislocations in the schools, temporarily abating the explosion of law school enrollments.[6] All of us have mused on the reasons for this decline. Was it the shrinking number of twenty-two-year-olds? Surely that was one of the causes. But more importantly, why has the percentage of twenty-two-year-olds interested in law declined? Surely, it was not just the cancellation of L.A. Law.[7]

The recent news about dramatic increases in lawyer compensation in Silicon Valley, a phenomenon which is fast reverberating through the rest of the country, has suggested to me yet another possible cause for the decline in applications during the last ten years.[8] In any society, there are only so many people who have both the talent and the opportunity to achieve high professional status.

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6. Between 1990 and 1997, law school applications dropped twenty-seven percent from 99,300 to 72,300. *See* Katherine S. Mangan, *Students' Odds of Getting Into Law School Improve, but Their Qualifications Drop*, CHRON. HIGHER EDUC., Jan. 23, 1998, at A41; *see also* Amy Stevens, *Law Schools See Sharp Decline in Applicants*, WALL ST. J., Feb. 17, 1995, at B1.

7. Perhaps we have met the enemy and they are us. Surely there has been some impact resulting from the spate of popular books lamenting the state of the legal profession, particularly those books aimed at young people and beginning attorneys. *See, e.g.*, WILLIAM R. KEATES, PROCEED WITH CAUTION: A DIARY OF THE FIRST YEAR AT ONE OF AMERICA'S LARGEST, MOST PRESTIGIOUS LAW FIRMS (1997); THANE JOSEF MESSINGER, THE YOUNG LAWYER'S JUNGLE BOOK: A SURVIVAL GUIDE (1996); MY FIRST YEAR AS A LAWYER: REAL-WORLD STORIES FROM AMERICA'S LAWYERS (Mark Simenhoff ed., 1994); CAMERON STRACHER, DOUBLE BILLING: A YOUNG LAWYER'S TALE OF GREED, SEX, LIES, AND THE PURSUIT OF A SWIVEL CHAIR (1998).

8. In the early part of this year, Silicon Valley law firms led the nation in announcing dramatic associate salary increases, putting the base pay for first-year associates at $125,000. *See* Renee Deger, *Firms Fatten Associate Wallets*, RECORDER, Jan. 20, 2000, at 1. Those Silicon Valley firms with Washington D.C. outposts also matched the increases, "putting heat on the local firms to ante up as well." Vanessa Blum, *Would You Believe $145,000?*, LEGAL TIMES, Jan. 31, 2000, at 3. The competition among firms, particularly in the Washington D.C. area, has caused the average starting salary for first-year associates to rise by as much as sixty percent. *See* Antonio J. Calabrese et al., *The Squeeze is On*, LEGAL TIMES, April 10, 2000, at 33.

During many periods of our nation's life, large numbers of these potential stars found law to be attractive, and they filled up the law schools and later the profession.

In the last ten years, however, it has become increasingly apparent that the most profound changes being wrought in society are being effectuated by people in technology. This sea change in the role of technology has altered the relative attractiveness of the legal profession as compared to the world of technology and business. It has caused a larger share of the limited high-talent pool to flow to this part of the American economy, leaving the more traditional field of law with a smaller share of the brightest talent.

As the entry point for the profession, law schools have felt the sting of this trend earlier than the rest of us. We legal employers will as soon reap the same rewards as we find ourselves paying starting technicians nearly as much as we pay starting lawyers.

The schools are also central actors in this war of recruitment. Whether our profession can still be a magnet for the most able in our society is among the most crucial questions confronting us, and the role of the schools in helping make it so is more important today than it has ever been.

III. PROVIDE USEFUL SCHOLARSHIP

Quite aside from turning out good lawyers, schools have enormous potential to contribute to the daily practice of law through scholarship. In addition to their role as trainers of lawyers, law professors as scholars are very well situated to provide new intellectual seed corn for the legal endeavor.

On this score, the profession expects more from its scholars than it now receives.[9] The concentration of American law journals and American law journal writing on matters so arcane that professionals find little use for them ought to be a matter of more candid discussion.

One might expect that the hot journals of our profession would be those in which great debates rage—the journals from places like Berkeley, Chicago, Yale,

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9. Judge Harry T. Edwards has been quite vocal in critiquing legal education on this point. Beginning with the premise that the purpose of law school is to educate future lawyers, Judge Edwards writes:

> For some time now, I have been deeply concerned about the growing disjunction between legal education and the legal profession. I fear that our law schools and law firms are moving in opposite directions. The schools should be training ethical practitioners and producing scholarship that judges, legislators, and practitioners can use.... But many law schools—especially the so-called "elite" ones—have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy.

Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992). *See also* Harry T. Edwards, *Another "Postscript" to "The Growing Disjunction Between Legal Education and the Legal Profession,"* 69 WASH. L. REV. 561 (1994); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191 (1993).

and Harvard. Whether practitioners regard these publications as hot items may be measured by considering their circulation. By this standard, the leading law journal in America is not the *Harvard Law Review* but rather *The Business Lawyer*. It has three or four times the readership of the four journals mentioned earlier put together. The most common situation is the journal of five or six hundred subscribers, of whom half are law school libraries and law teachers.[10] It ought to be rather chastening to contemplate that no more than five or six percent of the country's practitioners believe they receive value sufficient to warrant the very modest subscription prices charged by the journals at most schools.[11]

Of course, the propagation of scholarship is hardly the sole purpose of American journals. Plainly, law journals represent an opportunity for students to hone their writing and research skills in a way that is serious and well-organized and connected to seasoned scholars. Surely, this is the main reason why schools have been willing to finance the dramatic expansion of law journals over the last thirty years.[12]

One can accept this internal benefit of journals and still believe that they do not provide all that the profession expects. Whether this can be altered is open to doubt. The internal reward system of the academy is inextricably bound up with this penchant for the arcane. It makes the school's scholarship less useful to the profession than it would otherwise be and therefore squanders a resource that might be more helpful to us all.[13]

IV. CONTRIBUTE TOWARD ETHICAL CONDUCT

It is surely a part of the practitioners' duty to create working environments, in the office and in the courts, in which new lawyers learn and adopt high standards with respect to ethics and professionalism. The bench and bar expect

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10. *See* John E. Nowak, *Woe Unto You, Law Reviews!*, 27 ARIZ. L. REV. 317, 321 (1985) ("We do not need to worry about the consumers of law reviews because they really do not exist. A few professors who author texts must read some of the articles, but most volumes are purchased to decorate law school library shelves.").

11. The MacCrate Report observes:

> Practitioners tend to view much academic scholarship as increasingly irrelevant to their day-to-day concerns, particularly when compared with the great treatises of an earlier era. It is not surprising that many practicing lawyers believe law professors are more interested in pursuing their own intellectual interests than in helping the legal profession address matters of important current concern.

MACCRATE REPORT, *supra* note 4, at 5.

12. The 1970-1973 edition of the Index of Legal Periodicals indexed 387 legal periodicals, while the 1998-99 edition indexed 871. *See* 16 INDEX TO LEGAL PERIODICALS, at ix-xii (Grace W. Meyer ed., 1974); 38 INDEX TO LEGAL PERIODICALS, at ix-xv (Richard A. Dorfman ed., 1999).

13. Hearing these observations, Provost Roger Dennis of Rutgers University suggested that this phenomenon varies according to a school's ranking in the academic hierarchy. It may well be that law journals at the most elite schools are the least connected to the practice of law. If so, the capability-to-contribution ratio in those places is very unfavorable.

that this should also be a central mission for law schools. After all, first year students arrive at the schools knowing relatively little about the law or lawyering, and they acquire from the schools their initial understanding of the basic contours of how their new line of work functions.

It goes nearly without saying that there is considerable debate within the academy about how law schools can most effectively convey the best messages, but the profession as a whole is far from satisfied that the schools have this problem solved.[14] A lack of confidence in the professionalism performance by the schools has lead licensing bodies to impose discrete ethics education requirements on applicants for the bar.[15] The so-called pervasive method used in many schools seems all too often to mean that nobody in the school is actually in charge of assuring that law students learn the fundamentals of professional conduct.

I do not propose to engage you in detailed prescriptions, especially in light of the powerful talents who will tackle this topic later. Suffice it to say that this is a field that the bench and bar see as ranking with contracts and torts. The profession hopes that law schools will stand strong for a professional orientation that will serve graduates well for the long term.

V. HONOR THE PRACTITIONERS

Declarations by law faculty about the work of practitioners come in many shapes. Certainly, alumni magazines (mostly not written by faculty, of course) feature high praise for those who succeed in the mainstream practice of law. On the other hand, one does not have to look very far to find articles or statements that belittle the legal craft as practiced by America's 900,000 lawyers.[16]

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14. One author notes:

> At first-year orientation, representatives of most American law schools tell incoming students that the development of ethical lawyers is central to their mission. At graduation, these same representatives tell the newest members of the profession how diligently the schools have worked to mold ethical lawyers. But the events that unfold in the thirty-three months or so between these announcements reveal a gap between words and deeds, a gap rooted in confusion, uncertainty, and a lack of consensus about what teaching ethics is all about.

Peter K. Rofes, *Ethics and the Law School: The Confusion Persists*, 8 GEO. J. LEGAL ETHICS 981, 981-82 (1995).

15. *See* Ind. Admission and Discipline Rule 13(4) ("Each applicant for admission to the bar of this Court . . . shall be required to establish . . . that the applicant is: . . . A person who has completed in an approved school of law two cumulative semester hours of legal ethics or professional responsibility.").

16. Patrick Schiltz, for one, has been critical of the legal profession—particularly large firm practice—and of law schools' failure to prepare young lawyers for ethical dilemmas. *See* Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705 (1998); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52

While the bench and bar expect that scholars/teachers will apply their powers of analysis to the way in which the legal system and the court system perform their duties, they also believe that this critique is best performed under a regime of tough love. They expect that those who are training new lawyers or who achieve positions of public prominence and are therefore called upon to comment about the profession will do so in a way that honors what is good about the trade.

The practitioners also expect that their views will be respected in discussions about the training and continuing education of lawyers. Those who toil outside the academy are entitled to have their observations addressed on the merits. This occurs sometimes, and sometimes it does not.

VI. On James P. White

Finally, we must pause to recognize the monumental contribution of Jim White to the way in which we American lawyers learn about law. While he would be quick to acknowledge that American legal education is a vast enterprise influenced by a host of leaders and institutions, we can say with some confidence that he ranks with the likes of Langdell and Pound as a maker and re-maker of legal education. Lawyers by the hundreds of thousands (me included) have had their careers burnished by Jim White, usually without even knowing that it has been so. The breadth and staying power of his vision leads me quickly to remarks by Holmes in an 1886 lecture to Harvard undergraduates:

> No man has earned the right to intellectual ambition until he has learned to lay his course by a star which he has never seen—to dig by the divining rod for springs which he may never reach. In saying this, I point to that which will make your study heroic. For I say to you in all sadness of conviction, that to think great thoughts you must be heroes as well as idealists. Only when you have worked alone—when you have felt around you a black gulf of solitude more isolating than that which surrounds the dying man, and in hope and in despair have trusted to your own unshaken will—then only will you have achieved. Thus only can you gain the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought—the subtile rapture of a postponed power, which the world knows not because it has no external trappings, but which to his prophetic vision is more real than that which commands an army. And if this joy should not be yours, still it is only thus that you can know that you have done what it lay in you to do—can say that you have lived, and be ready for the end.[17]

How happy we are, in celebrating Jim White's career, to know that the end is yet far ahead.

VAND. L. REV. 871 (1999).

17. G. Edward White, *Holmes's "Life Plan": Confronting Ambition, Passion, and Powerlessness*, 65 N.Y.U. L. REV. 1409, 1430-31 (1990) (quoting THE OCCASIONAL SPEECHES OF JUSTICE HOLMES 28-31 (M. Howe ed., 1962)).

WHAT THE LEGAL PROFESSION EXPECTS OF LAW SCHOOLS: A RESPONSE

ROBERT A. STEIN*

INTRODUCTION

In his paper, Chief Justice Randall T. Shepard poses the question: What does the legal profession expect of our law schools?[1] The short answer, of course, is a great deal. The profession has come a long way from the days of apprenticeships and "reading for the law," as was customary in the Nineteenth and early Twentieth Centuries. Expectations have risen, at least in part, because of the success law schools have had in producing generation after generation of good, competent lawyers. Moreover, there have been enormous changes in the last twenty to thirty years—both in the way law is practiced, as well as how lawyers are viewed by the public and by themselves. These changes have caused other segments of the legal profession to demand and expect more of law schools.

Although each expectation discussed in Chief Justice Shepard's paper is important and merits thoughtful consideration, this response focuses on only two and adds a third. The three areas of expectation discussed below are: producing good lawyers, providing useful scholarship, and promoting active participation by legal academics in the law reform process.

I. PRODUCING GOOD LAWYERS

As Chief Justice Shepard persuasively demonstrates, one of the legal profession's primary expectations of law schools is the production of good lawyers.[2] This expectation underscores the importance of the accreditation work performed by the Section of Legal Education and Admissions to the Bar.

The profession expects law schools to have high admissions standards and admit only those applicants who have the ability to practice law competently. Law schools are expected to recruit highly intelligent, talented students who are among the best and brightest of college graduates. Law school is a rigorous intellectual experience that requires not only intelligence but also discipline and determination.

In addition, although high academic achievement is essential, other less tangible qualities are also important. For example, factors such as an applicant's leadership qualities and commitment to the community are often taken into account in the admissions process. Students deeply rooted in their communities

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* Executive Director, American Bar Association. I would like to thank Macarena Tamayo-Calabrese, Special Assistant to the Executive Director, for her valuable assistance in the preparation of this Article. The views expressed are those of the author and do not necessarily represent ABA policy.

1. *See* Randall T. Shepard, *What the Legal Profession Expects of Law Schools*, 34 IND. L. REV. 7 (2000).

2. *See id.* at 9.

are much more likely to do pro bono work and become respected members and perhaps leaders of their communities. In addition to admitting students with strong intellectual and leadership capabilities, law schools must also serve the legal profession by recruiting classes of students that reflect not only diversity in gender, economic and social backgrounds, but also racial and ethnic identification.

The legal profession is the gatekeeper of our justice system. Society depends upon the legal profession to ensure the fair and equitable administration of justice. Although our country's population is roughly thirty percent non-white, minorities represent only about eight percent of the legal profession.[3] Furthermore, the gap between the diversity of the profession and the diversity of American society as a whole is widening. For instance, in the next few decades, the percentage of minorities in the United States is projected to grow to more than fifty percent.[4] However, even if the current minority enrollment trends in law schools continue, the legal profession will only consist of about twenty percent minorities.[5]

In 1999, under the leadership of President William G. Paul, the American Bar Association undertook an intensive initiative to develop programs to increase racial and ethnic diversity at all levels within the legal profession.[6] Obviously, law schools must play a leading role in this effort. Both the bar and law schools must work together to identify and implement strategies that will increase the diversity of law school student bodies.

Law schools should be encouraged to experiment with alternative admission policies that promote diversity without sacrificing their perceived status in various published rankings.[7] The experimental admission policies suggested by the Committee on Diversity of the Section of Legal Education and Admission to the Bar should be piloted at various law schools to determine whether they produce a more diverse, yet still highly talented, student body.[8]

In February 1998, the *ABA Journal* began a series of special reports on race and the law. The first of these reports, entitled *Race and the Law*, was published

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3. *See* COMMISSION ON RACIAL AND ETHNIC DIVERSITY IN THE PROF., A.B.A., MILES TO GO 2000: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION, at v, 1 (2000).

4. *See id.* at 22; *see also* Jennifer Cheeseman Day, *Current Population Reports—Population Projections of the United States by Age, Sex, Race, and Hispanic Origin: 1993-2050*, DEPT. OF COMMERCE at xxii (1993).

5. *See* SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE B., A.B.A., 1999 STATISTICAL REPORT FROM THE ABA ANNUAL QUESTIONNAIRE TO LAW SCHOOLS, Table C-1 (1999).

6. *See* William G. Paul, *Our Millennial Mission*, A.B.A. J., Sept. 1999, at 8; *see also* William G. Paul, *Increasing Diversity*, A.B.A. J., Oct. 1999, at 8.

7. *See* AMERICAN BAR ASSOCIATION, AMERICAN BAR ASSOCIATION RESOURCE GUIDE: PROGRAMS TO ADVANCE RACIAL AND ETHNIC DIVERSITY IN THE LEGAL PROFESSION 25-46 (July 2000).

8. *See* SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE B., A.B.A., REPORT OF THE COMMITTEE ON DIVERSITY IN LEGAL EDUCATION (1998).

in collaboration with the *National Bar Association Magazine*.[9] This special report was intended in some ways to close the division between the races; instead it yielded a frightening reality. From partnerships to tokenism, from clerkships to judgeships, and from jury selection to racial profiling, black and white lawyers do not seem to see eye to eye.[10]

Likewise, divergent viewpoints exist between white and Hispanics lawyers. As a continuation of these special reports, the *ABA Journal*, in conjunction with the Hispanic Bar Association, published another report on race entitled *Waiting to Celebrate*.[11] The report indicated that Hispanic lawyers and non-lawyers alike perceive the American justice system as having a "set of harsh rules for minorities and softer ones for whites."[12] The article cites examples ranging from higher incidents of arrest of minorities due to racial profiling to more subtle forms of discrimination such as requiring minorities to provide additional identification to cash personal checks.[13]

Regardless of the accuracy of these examples, the negative perceptions continue to persist and threaten public support for the justice system. The law school experience, in many respects, is a time to broaden one's intellectual horizons and thus an ideal time to learn the importance of diversity. As part of the law school experience, students are challenged to detach themselves from personal biases, and they are therefore more likely to consider the merits of opposing points of view. Learning the importance of diversity is essential because diversity is not merely a matter of numbers, nor is it just about better jobs, better education, or financial security. Diversity is about the recognition of the equal value of human life, regardless of race. And law school provides an environment in which learning the importance of diversity can be achieved.

In addition to expecting law schools to play a leading role in diversity, the legal profession also expects law schools to adequately train their students for the practice of law. This includes traditional training in thinking and reasoning, sometimes referred to as teaching law students to "think like lawyers." This learned skill of critical analysis has equipped law school graduates with the tools to succeed not only in the practice of law but in a variety of fields, including the judiciary, business, and government.

Today, law schools must do more than train students in traditional analytical skills. Law schools must also teach students ethical lawyering skills. Changes in the legal profession have reduced the likelihood that lawyers will acquire these skills in their practice. For example, for the majority of lawyers today who practice in solo or small firm settings there is very little, if any, on the job mentoring available.[14] Likewise, larger firms have little time for mentoring due

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9. Gary A. Hengstler & Maurice Foster, *Race and the Law*, A.B.A. J., Feb. 1999, at 41.
10. *See* Terry Carter, *Divided Justice*, A.B.A. J., Feb. 1999, at 43, 43-47.
11. Julie Amparano, *Waiting to Celebrate*, A.B.A. J., July 1999, at 68.
12. *Id.* at 69.
13. *See id.*
14. *See* AMERICAN BAR FOUNDATION, THE LAWYER STATISTICAL REPORT—THE U.S. LEGAL PROFESSION IN 1995 (1999).

to economic forces.[15]

In the early 1990s, the Section of Legal Education and Admissions to the Bar published a Task Force Report, entitled *Law Schools and the Profession: Narrowing the Gap*.[16] This report became known as the MacCrate Report, named after the Chair of the Task Force, former ABA President Robert MacCrate.

The report was published shortly before my term as Chair of the Section of Legal Education and Admissions to the Bar. During the year I served as Chair, a national conference was held to discuss the MacCrate Report and encourage its implementation.[17] I am pleased that in the six years since that conference, the recommendations of the MacCrate Report have been largely embraced by the nation's law schools.

The MacCrate Report identified ten fundamental lawyering skills that needed to be taught by law schools:

1. problem solving;
2. legal analysis and reasoning;
3. legal research;
4. factual investigation;
5. communication;
6. counseling;
7. negotiation;
8. litigation and alternative dispute resolution procedures;
9. organization and management of legal work; and
10. recognizing and resolving ethical dilemmas.[18]

Today, most law schools attempt to teach these lawyering skills. However, since doing so requires intensive instruction in smaller class settings, it is much more expensive than traditional legal education. Additionally, because law schools must continue to offer the traditional legal education as well, utilizing this new form of teaching as an add-on imposes further financial burdens.

Furthermore, the legal profession also expects law schools to begin instructing students on the meaning of professionalism. Many observers believe there has been a decline in professionalism throughout the legal profession in recent years.[19] This observation is based on:

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15. *See generally* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

16. SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE B., A.B.A., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, 1992) [hereinafter MACCRATE REPORT].

17. *See* Invitational Conference on the MacCrate Report, A.B.A., in Minneapolis, Minn. (Sept. 30-Oct. 1, 1994) (sponsored by the Section of Legal Education and Admissions to the Bar and West Publishing).

18. *See* MACCRATE REPORT, *supra* note 16, at 138-40.

19. *See* CONF. OF CHIEF JUSTICES COMMITTEE ON PROFESSIONALISM AND LAW. COMPETENCE, A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM at vii (Report of the Working Group on Lawyer Conduct and Professionalism, 1998); *see also* SEC. OF

- more reports of unethical behavior;
- advertising that seems to reduce law practice to the level of selling used cars;
- evolution of law practice as a bottom-line business;
- large numbers of lawyers fiercely competing for legal business; and
- inability of lawyers to rely on another lawyer's word.[20]

It is clear that law schools alone cannot change all of these developments. Indeed, every institution in the legal profession has a role. Law schools can, however, begin to teach the concept of professionalism to students. It is important for law students to explore the meaning of professionalism in today's world. Acceptable concepts of professionalism in a vastly different professional environment years ago may be inappropriate in today's legal environment and should be replaced with more suitable standards.

The Section of Legal Education and Admissions to the Bar Professionalism Committee, together with the ABA's Standing Committees on Professionalism and Lawyer Competence, sponsored an excellent symposium on professionalism in 1996.[21] This symposium was developed under the leadership of former ABA President Reece Smith, who chaired the Section's Committee, and Dean Harry Haynsworth of the William Mitchell College of Law. The symposium produced an outstanding report entitled *Teaching and Learning Professionalism*.[22] This publication continues to be one of the best sources of information on the meaning of professionalism.

II. USEFUL SCHOLARSHIP

Another expectation developed by Chief Justice Shepard is the need for useful scholarship.[23] The great legal minds in the academic branch of our profession must help address the difficult problems facing our justice system. These include the following major problems:

- How should the legal profession address the phenomenon of multi-disciplinary practices? Should they be prohibited or regulated under the rules of professional responsibility? How should the profession address the strong economic forces that operate to bring about multi-disciplinary practices? These are critical questions for the legal profession throughout the world, and the rest of the world is watching as the American legal profession attempts to resolve them.[24]

LEGAL EDUC. AND ADMISSIONS TO THE B., A.B.A., TEACHING AND LEARNING PROFESSIONALISM 2-3 (Report of the Professionalism Committee, 1996) [hereinafter TEACHING AND LEARNING PROFESSIONALISM].

20. *See generally* TEACHING AND LEARNING PROFESSIONALISM, *supra* note 19.

21. Symposium, TEACHING AND LEARNING PROFESSIONALISM (Oak Brook., Ill., Oct. 2-4,1996).

22. *See* TEACHING AND LEARNING PROFESSIONALISM, *supra* note 19.

23. *See* Shepard, *supra* note 1, at 11-12.

24. *See generally* Robert A. Stein, *Multidisciplinary Practices: Prohibit or Regulate?*, 84

- How should the legal profession respond to continuing threats to judicial independence? Where should the line be drawn between fair criticism of judicial decisions and inappropriate threats to judicial independence? Judicial independence is an essential requirement for a free and democratic society. How can it be safeguarded in an environment where it is necessary for judges to raise funds from lawyers for their election campaigns?
- How can the legal profession provide access to justice for persons with low and moderate incomes? Millions of Americans are in danger of losing their opportunity for legal representation. Both continuing efforts to dismantle the Legal Services Corporation and court challenges to the IOLTA program are serious threats to the source of major funding for legal representation of low and moderate income Americans. They must be addressed to avoid rationing justice on the ability of clients to pay.
- How should the legal profession address the numerous questions in areas of substantive law, such as what law applies in cyberspace. In 1998, the United States Attorney General, Janet Reno, indicated to me that this matter was one of the most vexing law enforcement issues she is facing. Where, for example, does a crime occur when a person in a Latin American country fraudulently sends a computer directive to a bank in Europe to transfer funds from the account of an American corporation to an account of an Asian corporation at a bank in Australia?
- Who owns the great variety of electronic information available on the complex computer network throughout the world? These are some of the many difficult questions addressed by the Uniform Computer Information Transactions Act recently promulgated by the National Conference of Commissioners on Uniform State Laws.[25]

The problems listed above are just a small sampling of the many difficult questions facing the justice system. Their resolution demands the thoughts, insights, and scholarship of the best minds in the country. Unfortunately, however, these types of problems are rarely addressed in the law reviews of this country.

Judge Harry Edwards commented on this problem in a significant article in the *Michigan Law Review* eight years ago.[26] As Judge Edwards concluded, "[t]here are too few books, treatises, and law review articles now that usefully 'chart the line of development and progress' for judges and other governmental decisionmakers."[27] While the article may have overstated the concern, a serious

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MINN. L. REV. 1529 (2000).

25. *See* UNIF. COMPUTER INFO. TRANSACTIONS ACT (amended 2000), *available at* the Uniform Law Commissioners' official website, http://www.law.upenn.edu/bll/ulc/ulc_frame.htm.

26. *See* Edwards, *supra* note 15, at 38.

27. *Id.* at 50.

problem exists. A healthy balance is needed between theory and practice in both legal scholarship and in our nation's law schools.[28]

III. ACTIVE PARTICIPATION BY ACADEMICS IN THE LAW REFORM PROCESS

I would like to add another expectation to those raised by Chief Justice Shepard in his paper. The legal profession needs the active participation of legal academics in every aspect of the law reform process. This can be satisfied in many ways, but particularly through involvement in such outstanding law improvement organizations as the American Law Institute and the National Conference of Commissioners on Uniform State Laws. These organizations need the active involvement of law professors, as well as judges and lawyers.

Professor Geoffrey Hazard discussed this need for law professor involvement in an article in the *Minnesota Law Review* in 1994, where he decried "the growing distance between the mental worlds in which practitioners and academics respectively function."[29] To most effectively reform the law, the legal profession needs both the ability of law professors to develop broad general principles and the ability of practitioners to set forth the details of the problems and convey their understanding of what is workable in a practical sense. In discussing this dual need in the context of the development of Restatements, Professor Hazard wrote:

> [I]t is one thing to say that Article 2 of the Uniform Commercial Code should protect consumers against unfair overreaching by vendors of appliances and automobiles. It is another thing to formulate a rule that will not make every consumer transaction vulnerable to a credibility dispute. In the Restatement of the Law Governing Lawyers, it is one thing to recognize that a lawyer representing a trustee or other fiduciary has some greater responsibility to the beneficiaries than to other nonclient third parties. It is another thing to formulate a rule that does not make the lawyer an indemnitor for a trustee's malfeasance, or perhaps even misfeasance.[30]

I agree completely with Professor Hazard when he concludes "[t]he possibility for ameliorative change in the law can be appreciated in encounters between practitioners capable of reflection on experience and academics concerned with how the law actually works."[31] That is what the profession needs and

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28. *See* Harry T. Edwards, *The 21st Century Lawyer: Is There a Gap to be Narrowed? Another "Postscript" to "The Growing Disjunction Between Legal Education and the Legal Profession,"* 69 WASH. L. REV. 561, 564 (1994); *see also* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191, 2195 (1993).

29. Geoffrey C. Hazard, *A Tribute to Dean Robert A. Stein: Former Dean of the University of Minnesota Law School*, 80 MINN. L. REV. 14, 16 (1995).

30. *Id.* at 17-18.

31. *Id.* at 18.

expects—law professors concerned with how the law actually works.

CONCLUSION

This response has focused on three general expectations the legal profession has of law schools. The legal profession expects law schools to:

- produce good lawyers;
- provide legal scholarship with a healthy balance between theory and practice in order to assist the profession in addressing the enormously difficult problems facing our justice system; and,
- encourage active involvement in law reform activities by law professors who are concerned about how the law actually works.

These are demanding expectations, but I believe the nation's law schools can deliver.

LEGAL EDUCATION: PROFESSIONAL INTERESTS AND PUBLIC VALUES

DEBORAH L. RHODE*

"All that is necessary for a [law] student is access to a library, and directions in what order the books are to be read."[1] That was Thomas Jefferson's view, and during the American bar's formative years, it was widely shared. In the Eighteenth and Nineteenth Centuries, most legal education occurred through apprenticeships with practicing lawyers, which often provided more drudgery than instruction. Alternatively, students could enroll in one of the few for-profit law schools, where quality varied considerably. Toward the end of the Nineteenth Century, training for law, like other professions, grew more formal and academic.[2] By the close of the Twentieth Century, about 180 law schools had three-year programs that met the American Bar Association's accreditation standards, and together graduated about 50,000 students each year.[3]

To many observers, the migration of legal education into these standardized academic programs seems a mixed blessing. Certainly, the overall quality of instruction has greatly increased. But so has the expense. And, despite some recent improvements, the disjuncture between legal education and legal needs remains substantial. America offers the world's most expensive system of legal education, yet fails to address routine legal problems at a price most low and many middle income Americans can afford. Today's law students can graduate well-versed in postmodern literary theory, but ill-equipped to draft a document. They may have learned to "think like a lawyer," but not how to make a living in the process.

These concerns are by no means a recent phenomenon, and some are probably inherent in the enterprise. Legal education has multiple constituencies with competing agendas and expectations. Law schools are expected to produce both "Pericles and plumbers"—lawyer statesmen and legal scriveners.[4] Faculty, students, clients, consumers, and central university administrators all have priorities that push schools in different directions. But it is by no means clear that legal education has developed the most effective structure for

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1. THOMAS JEFFERSON, WRITINGS 966 (Merrill D. Peterson ed., 1984).

2. *See* ROBERT BOCKING STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 73-130 (G. Edward White ed., 1983).

3. *See* SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE B., A.B.A., OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 449-50 (Rick L. Morgan & Kurt Snyder eds., 2000 ed.).

4. *See* William Twining, *Pericles and The Plumber*, 83 LAW Q. REV. 396, 397 (1967).

accommodating these varied concerns. As in other contexts involving professional regulation, the public has little influence over institutions that profoundly affect its interests. Key decisions are controlled by legal academics, who have the greatest expertise, but also the greatest self-interest in educational policy.

Any serious commitment to improvements in the practice of law and the regulation of lawyers must start in law schools. The foundations of our legal culture are laid in educational institutions. Significant reforms will be impossible unless we change how future lawyers think about their professional roles and responsibilities. In short, both the profession and the public need to provide more searching scrutiny of law schools.

Although there is widespread agreement about educational objectives, there is considerable room for improvement in the effort to realize them. At the abstract level, the educational mission is straightforward. Law schools should equip their graduates with legal knowledge, legal skills, and above all, legal judgment. Students should acquire the habits of mind and ethical values that will serve the public in the pursuit of justice. To realize those objectives, law schools should reflect the diversity in backgrounds and perspectives of the broader culture. Their curricula should address the diversity in American legal needs. By these standards, legal education falls short. For too many students, it is not an effective or efficient way of providing essential skills. In too many institutions, diversity remains an aspiration, not an achievement. For too many faculty, professional responsibility remains someone else's responsibility.

At the turn of the last century, Thorstein Veblen declared that a law school "belongs in the modern university no more than a school of fencing or dancing."[5] In an effort to establish its place and pedigree, legal education lost touch with part of its mission. Legal academics have long sought to cast law as a "science," through the case method of instruction and rigorous doctrinal analysis. That legacy has proven inadequate. Meeting the needs of the profession and the public will require fundamental changes in law school structures, curricula, and priorities.

I. THE STRUCTURE OF LEGAL EDUCATION

The structure of legal education reflects a complex mix of public policy, professional oversight, market pressure, and academic self-interest. The United States Department of Education recognizes the American Bar Association's Council of the Section of Legal Education and Admission to the Bar as the accrediting authority for law schools. Under that authority, the Council has developed detailed standards governing matters such as classroom hours, student-faculty ratios, and library resources. About four-fifths of the states admit only lawyers who have graduated from an ABA-accredited law school and have passed a bar exam. Other states have developed their own accreditation systems, and some, like California, admit graduates of unaccredited schools who pass the

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5. THORSTEIN VEBLEN, THE HIGHER LEARNING IN AMERICA 211 (1918).

bar exam.

The rationale for a system of accreditation parallels the rationale for other forms of professional regulation: a totally free market for legal education would not provide sufficient quality control to protect the public interest. Students, the most direct consumers of legal education, have limited information for comparing law schools and limited capacity to assess the information available. Seldom do they have a basis for judging how characteristics like faculty teaching loads, library services, or reliance on adjunct professors will affect the educational experience.

Many students rely heavily on aggregate rankings, particularly the *U.S. News and World Report* survey.[6] However, the factors that most influence a school's position in such rankings are highly incomplete and often unreliable. For example, about two-thirds of a school's *U.S. News* score is based on the selectivity of its admissions, measured by LSAT scores, and on its general reputation among surveyed academics, lawyers, and judges.[7] As the discussion below suggests, test scores are an inadequate measure of applicant qualifications, and reputational rankings are a similarly inadequate proxy for educational quality. Few of those surveyed possess enough systematic knowledge about a sufficient number of institutions to make accurate comparative judgments. Many participants rely on the word-of-mouth reputation of the university, which explains why Princeton law and professional schools do so well even when they do not exist. Moreover, the ranking system excludes many factors that materially affect a student's educational experience, such as access to clinical courses, pro bono opportunities, and a diverse faculty and student body.[8]

That is not to suggest, as some law school deans have claimed, that all ratings are inherently flawed and the enterprise is comparable to ranking religions. Some characteristics can be objectively assessed, and schools should be held accountable for their performance. Students also have a legitimate interest in subjective factors like reputation, however fuzzy the measures. Prestige is, after all, part of what they are purchasing. Ratings can supply a useful counterweight to complacency and a check on puffing. In their absence, applicants might well encounter an educational Lake Woebegon, where all institutions are above average. But the problems with rankings like the *U.S. News & World Report* are that they assign arbitrary weights to an incomplete set of relevant characteristics, rely on inadequate measures of those characteristics, and offer a single final score. That score then establishes a pecking order for the top fifty schools and determines which tiers the remainder occupy. These rankings have assumed an importance out of proportion to their reliability, not only with prospective students, but also with administrators, faculty, and alumni. Such ratings often distort law schools' priorities; the temptation is to underinvest in features that

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6. *See* LAW SCHOOL ADMISSION COUNCIL, LAW SCHOOL APPLICANT STUDY 7, 19 (1999).

7. *See* Stephen P. Klein & Laura Hamilton, *The Validity of the* U.S. News & World Report *Rankings of ABA Law Schools* (Feb. 18, 1998), http://www.aals.org/validity.html (report commissioned by the Association of American Law Schools).

8. *See id.*; Paul D. Carrington, *Tanking the Rankings*, AM. LAW., Apr. 2000, at 39-40.

U.S. News & World Report editors find unimportant, like diversity or public service, and to divert scarce resources to promotional campaigns showcasing reputational measures.

A second problem in the market for legal education is that the most direct consumers—students—have interests that are not necessarily consistent with the interests of the ultimate consumers, clients, and the public. Education is one of the rare contexts where buyers often want less for their money. Many students would like to earn a degree with the minimal effort required to pass a bar examination and land a job. In the absence of accreditation standards, law schools would have to compete for applicants who viewed "less as more." Similar attitudes among central university administrations would compound the problem. Many administrators already view law schools as "cash cows." Most legal instruction can occur in relatively inexpensive large classes, and tuition can be set at comparatively high levels that reflect students' future earning potential. Without accreditation requirements, many universities would face even greater temptations to make law schools get by with less and to use more of their revenues for subsidizing other programs.

These concerns justify some regulatory standards, but it by no means follows that the current structure makes sense. A threshold problem arises from conflicts of interest. As a practical matter, control of the accreditation process rests largely with the ABA Council on Legal Education. In theory, its members are responsible for protecting the public. In fact, they are also representatives of, and accountable to, a profession with its own interests to protect. Lawyers have an obvious stake in limiting competition, preserving status, and preventing what many bar leaders perceive as "overcrowding." From their perspective, "less is more" in legal education, but in a different sense than for applicants or administrators. Less rigorous educational standards mean more new lawyers, more hungry mouths to feed, and more competitive pressures.[9]

Legal educators have an even greater stake in the educational structure. In a *New York Times Magazine* profile, one faculty member put the point bluntly: whatever its other faults, "law school works pretty well for us."[10] On average, legal academics earn the highest salaries of all university faculty.[11] And the accreditation process protects key aspects of their quality of life, such as tenure, teaching loads, and research support.

Whether those standards protect the public as well as the profession is another matter. To be sure, the government makes some effort to ensure that the accreditation process is not narrowly self-serving. During the mid-1990s, the Justice Department's Antitrust Division forced changes in some plainly

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9. *See* Charles B. Colvin, *"Yes, There Are Too Many Lawyers" Now What Do We Do About It?*, 42 LA. B. J. 246, 247 (1994); Robert F. Potts, *Too Many Lawyers, Too Few Jobs*, CHRON. HIGHER EDUC., Feb. 2, 1996, at B1.

10. David Margolick, *The Trouble With American Law Schools*, N.Y. TIMES MAG., May 22, 1983, at 21, 39.

11. *See* Alison Schneider, *Law and Finance Professors Are Top Earners in Academe, Survey Finds*, CHRON. HIGHER EDUC., May 28, 1999, at A14.

protectionist standards involving matters such as faculty salaries and competition from non-accredited schools. Under recently revised regulations, the Department of Education also has authority to ensure that accreditation standards are "valid and reliable indicators of the quality of the education or training provided," and are "relevant to the . . . needs of affected students."[12] A Department review of law school standards is in process, and it is not yet clear how demanding government scrutiny will be. Traditionally, the views of legal academics have been given great deference in the accreditation process, largely due to concerns about academic freedom and difficulties in measuring educational quality. The price of that deference has been a structure that inadequately serves the public interest.

Accreditation requirements substitute detailed regulation of educational input—such as facilities, resources, and faculty-student contact—for more direct measurement of educational output. Yet no evidence suggests that greater variation in these characteristics would significantly affect performance in practice. The limited data available reflect no correlation between the quality of a law school by conventional measures and the frequency of malpractice among its graduates.[13] Considerable research also suggests that the current educational structure leaves many students both underprepared and overprepared to meet societal needs. They typically are overqualified to offer routine assistance at affordable costs. And they frequently are underqualified in practical skills and inadequately exposed to interdisciplinary approaches that could inform legal practice in areas such as finance, management, counseling, and information technology.

On the infrequent occasions when attorneys are asked to evaluate their legal education, most report considerable dissatisfaction with skills preparation. For example, between two-thirds to four-fifths of surveyed graduates believe that negotiation, fact gathering, and document preparation could be taught effectively, but only about a quarter feel that those subjects receive sufficient attention.[14] Similar inadequacies are apparent for problem solving, oral communication, counseling, and litigation.

This mismatch between what law schools supply and what law practice requires calls for a different approach. The diversity in America's legal needs demands a corresponding diversity in legal education. Accreditation frameworks should recognize in form what is true in fact. Legal practice is becoming increasingly specialized. It makes little sense to require the same training for the Wall Street securities specialist and the small town matrimonial lawyer. While some students may want a generalist degree, others could benefit from a more specialized advanced curriculum, or from shorter, more affordable programs that would prepare graduates for limited practice areas. A similar point was made

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12. 34 C.F.R. § 602.23(b)(5) (1995).

13. *See* Manuel R. Ramos, *Legal Malpractice: No Lawyer or Client Is Safe*, 47 FLA. L. REV. 1, 37 (1995).

14. *See* Joanne Marlin & Bryant G. Garth, *Clinical Education as a Bridge Between Law School and Practice: Mitigating the Misery*, 1 CLINICAL L. REV. 443, 448 (1994).

some seventy-five years ago in a prominent Carnegie Foundation report by Alfred Reed, *Training for the Public Profession of Law*.[15] Since then, the variation across substantive fields has grown more pronounced. For some routine services, most law schools' current three-year program is neither necessary nor sufficient.[16] Almost no institutions require students to be proficient in areas where unmet legal needs are the greatest, such as bankruptcy, immigration, uncontested divorces, and landlord-tenant matters. Other nations permit non-lawyers with legal training to provide these services without demonstrable adverse effects.[17] American law schools could offer such training and help design licensing structures that would increase access to affordable assistance from paralegal specialists.

The profession, as well as the public, would benefit from an educational system that serves more diverse audiences in more diverse ways. As costs escalate, applicant pools decline, and placement markets tighten, law schools have much to gain from broadening their mission and potential student body. Abandoning a one-size-fits-all accreditation framework would open a range of possibilities. Some schools could offer less expensive two or three-year programs. A few states have accredited such programs, which cut tuition by strategies such as increased reliance on adjuncts and on-line library resources. Other institutions could supplement their standard curriculum with courses for paralegals, undergraduates, and professionals in law-related occupations. Many schools could develop advanced interdisciplinary opportunities for law students and practitioners, or shortened degree programs for individuals who would be licensed to practice in limited fields. More Internet-based distance learning could help decrease costs and increase access to specialized instruction that cannot be efficiently provided at all institutions. Each of these initiatives would, of course, present complicated cost-quality tradeoffs. Not all of them might ultimately prove desirable, but we have no way of assessing the potential benefits without more innovation than the current structure permits.

Greater diversity in legal education would also permit greater diversity in the legal profession and in the career paths of its members. The expense of current programs excludes many individuals from disadvantaged backgrounds. Others who obtain legal degrees acquire such substantial debt burdens that they cannot afford to pursue the public-interest or public-sector career choices that led them to law in the first instance. A growing number of graduates are unable to find jobs that pay enough to meet their loan obligations. Law school graduates have the highest default rate on student loans of all professionals, and almost a fifth declare bankruptcy.[18] Although some schools have developed loan forgiveness

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15. ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF LAW 281-87 (1921).

16. *See* W. SCOTT VAN ALSTYNE, JR. ET AL., THE GOALS AND MISSIONS OF LAW SCHOOLS 43, 63, 83-85 (1990); *see also* Deborah L. Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 989, 1014-18 (1998).

17. *See* Rhode, *supra* note 16, at 1015.

18. *See* Ann Davis, *Graduate Debt Burden Grows: Of All Professionals, Law Grads Have*

programs for graduates who accept poorly paid public service positions, these programs address only a small part of the demand. More varied and affordable educational programs could increase the number and career options of low income applicants.

Not only should there be more choices in legal education, but students should also have more reliable information about the choices available. The need for such information is not met by rankings like those of *U.S. News & World Report* and its competitors or by the limited standardized information that the ABA supplies. Prospective students need more comparative data, and schools need more incentives to compete, across a broader range of characteristics than current rating systems address. So, for example, applicants might benefit from approaches adapted from undergraduate education that evaluate schools by reference to "best practices" in teaching. Such approaches can provide comparative data on students' experiences on matters such as faculty contact, effective feedback, skills instruction, and collaborative projects.[19]

That is not to suggest that a totally unregulated market in legal education with complete deference to consumer choices would be desirable. The public has an interest in maintaining threshold quality standards, and some students lack sufficient judgment, experience, or incentives to choose effective programs. However, given the inadequacies of the current educational structure, more variation, experimentation, and research are justified. To make intelligent policy decisions, both the profession and the public need to know more about how different educational approaches affect performance in practice. Whether or not legal education should let a thousand flowers bloom, it should at least permit choices between delphiniums and dahlias.

II. DIVERSITY

Not only has legal education provided too little diversity across institutions, it has also provided too little assurance of diversity within institutions. To be sure, the last quarter century has brought impressive progress. Until the 1960s, American lawyers received their training in institutions that were almost entirely white and male. Sol Linowitz, a prominent Washington attorney, recalls that there were only two women in his law school class. Neither he nor his classmates questioned the skewed ratio, although they did feel somewhat uncomfortable when their two female colleagues were around. And he ruefully acknowledges, "[i]t never occurred to us to wonder whether *they* felt uncomfortable."[20]

By contrast, forty-five percent of today's entering law students are female

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Compiled the Worst Loan Default Record, NAT'L L.J., May 22, 1995, at A1.

19. *See* Gerald F. Hess, *Seven Principles for Good Practice in Legal Education*, 49 J. LEGAL EDUC. 367 (1999); Ben Gose, *A New Survey of 'Good Practices' Could Be an Alternative to Rankings*, CHRON. HIGHER EDUC., Oct. 22, 1999, at A65.

20. SOL M. LINOWITZ & MARTIN MAYER, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY 6 (1994).

and about twenty percent are from racial and ethnic minorities.[21] But too many of these individuals still feel uncomfortable in the educational environment, and too few have advanced to positions where they can significantly affect it. Women and men of color are still overrepresented at the bottom of academic pecking orders and underrepresented in the upper ranks of tenured faculty and senior administrative positions. Only twenty percent of full professors and ten percent of law school deans are female, and only ten percent of those in either position are faculty of color.[22] These racial and gender disparities in promotion cannot be explained solely by disparities in objective qualifications, such as academic credentials or experience.[23] Women and minority students are also more likely to be silenced in the classroom and harassed outside it.[24] Issues concerning race, gender, and sexual orientation are often missing or marginal in core curricula.[25] Given these patterns, it is scarcely surprising that women and minorities report higher levels of dissatisfaction and disengagement with the law school experience.[26] If our goal is to create an educational community, and ultimately a profession, of equal opportunity and mutual respect, we have a significant distance yet to travel.

At the same time, efforts to narrow that distance are under siege. California's Proposition 209 and a federal court of appeals ruling in *Hopwood v. Texas*[27] have prohibited reliance on race at universities within their

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21. *See* Richard A. White, *Summary from the Directory of Law Teachers* (Nov. 1999) (unpublished memoranda, on file with author).

22. *See id.*; *see also* COMMISSION ON WOMEN IN THE PROF., A.B.A., ELUSIVE EQUALITY: THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION 23 (1996) (using similar statistics) [hereinafter ELUSIVE EQUALITY]; COMMISSION ON OPPORTUNITIES FOR MINORITIES IN THE PROF., A.B.A., MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION 16, 17 (1998) [hereinafter MILES TO GO].

23. *See* Deborah J. Merritt & Barbara F. Reskin, *The Double Minority: Empirical Evidence of a Double Standard in Law School Hiring of Minority Women*, 65 S. CAL. L. REV. 2299 (1992); *see also* REPORT, RICHARD A. WHITE, THE PROMOTION, RETENTION AND TENURING OF NEW LAW SCHOOL FACULTY HIRED IN 1990 AND 1991 (Sept. 22, 1999) (finding disparities in promotion without attempting to control for all variables) (on file with author).

24. *See* ELUSIVE EQUALITY, *supra* note 22, at 15-16; LAW SCHOOL OUTREACH PROJECT OF THE GENDER BIAS FREE JURISPRUDENCE COMMITTEE OF THE CHICAGO BAR ASSOCIATION ALLIANCE FOR WOMEN, WOMEN STUDENTS' EXPERIENCES OF GENDER BIAS IN CHICAGO AREA LAW SCHOOLS: A STEP TOWARD A GENDER BIAS FREE JURISPRUDENCE 24 (1994) [hereinafter LAW SCHOOL OUTREACH PROJECT]; Deborah L. Rhode, *Whistling Vivaldi: Legal Education and the Politics of Progress*, 23 N.Y.U. REV. L. & SOC. CHANGE 217, 218 (1997).

25. *See* LAW SCHOOL OUTREACH PROJECT, *supra* note 24, at 21-22, 24; *see also* LINDA F. WIGHTMAN, WOMEN IN LEGAL EDUCATION: A COMPARISON OF THE LAW SCHOOL PERFORMANCE AND LAW SCHOOL EXPERIENCES OF WOMEN AND MEN 25, 36, 72-74 (1996); Rhode, *supra* note 24, at 218.

26. *See* WIGHTMAN, *supra* note 25, at 36.

27. 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

jurisdictions.[28] Similar prohibitions are under consideration in other states as part of a national campaign against affirmative action. Opponents believe that policies based on race, ethnicity, or gender perpetuate a kind of preferential treatment that society should be seeking to eliminate. In critics' view, such treatment implies that women and men of color require special advantages, which reinforces the very assumptions of inferiority that our nation needs to counteract.

Yet while the stigma associated with affirmative action is clearly a problem, opponents mistake its most fundamental causes and plausible solutions. Assumptions of inferiority predated affirmative action and would persist without it. The absence of women and men of color in key legal roles is also stigmatizing. Moreover, we are unlikely to achieve a society without racial or gender prejudices by pretending that we already have one, or that all forms of preferential treatment are equally objectionable. Disfavoring women or men of color stigmatizes and subordinates the entire group. Disfavoring white males does not. Contrary to critics' assertions, the measures necessary for diversity do not compete with educational quality, but rather enhance it. The Supreme Court's landmark 1978 decision, *Regents of the University of California v. Bakke*,[29] recognized as much, and upheld the narrowly tailored use of racial consideration in admissions as long as they did not impose rigid quotas.[30] In his controlling opinion in *Bakke*, Justice Powell emphasized the crucial role that diversity plays in advancing intellectual inquiry and in exposing future leaders to different perspectives and values.[31]

Experience with affirmative action since *Bakke* has underscored the importance of those contributions. The value of diversity is widely acknowledged, as is clear from recent position papers by the Association of American Law Schools (AALS) and a coalition of virtually every other major organization in higher education.[32] Empirical research consistently finds that students who experience racial diversity in education show less prejudice, more ability to deal with conflict, better cognitive skills, clearer understanding of multiple perspectives, and greater satisfaction with their academic experience.[33]

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28. *See id.* at 934.

29. 438 U.S. 265 (1978).

30. *See id.* at 307-16.

31. *See id.* at 312.

32. *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER 218-55 (1998); DARYL G. SMITH ET AL., DIVERSITY WORKS: THE EMERGING PICTURE OF HOW STUDENTS BENEFIT (1997); ON THE IMPORTANCE OF DIVERSITY IN HIGHER EDUCATION, Grutter v. Bollinger, Statement by 67 Higher Education Organizations, in Amicus Curiae Brief of the Association of American Law Schools et al., *Grutter v. Bollinger*, 16 F. Supp. 797 (E.D. Mich. 1998) (on file with author) [hereinafter ON THE IMPORTANCE OF DIVERSITY]; Expert Report of Patricia Gurin, *Gratz v. Bollinger*, 183 F.R.D. 209 (E.D. Mich. 1998) (on file with author) [hereinafter Expert Report]; Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 746-50 (1998).

33. *See* GARY ORFIELD & DEAN WHITLA, DIVERSITY AND LEGAL EDUCATION: STUDENT EXPERIENCES IN LEADING LAW SCHOOLS 9-25 (1999); *see also* BOWEN & BOK, *supra* note 32, at

In a 1999 survey of some 1800 students at two leading law schools, some ninety percent reported positive effects of diversity on their educational experience.[34] As the AALS statement recognizes: "different backgrounds enrich learning, scholarship, public service, and institutional governance. They promote informed classroom interchanges and keep academic communities responsive to the needs of a changing profession and a changing world."[35] A commitment to diversity is socially necessary, constitutionally justified, and morally imperative. In legal education, that commitment requires initiatives aimed at restructuring admission processes and fostering law school environments of mutual respect.

To ensure adequate representation of students of color, law schools need admission criteria that more adequately reflect the range of talents required in legal practice. Most schools place undue reliance on LSAT scores and undergraduate grade point averages, a practice encouraged by *U.S. News & World Report* and similar rankings. Ironically enough, the quantitative criteria that were once introduced to limit biases and equalize opportunities are now having the opposite effect. Yet these ostensibly "merit" based criteria do not adequately assess it. Grades and test scores together predict only about a quarter of the variation in law school performance.[36] And we have no idea how well they predict performance in practice. The few attempts to follow students after graduation have not found significant relationships between law school grades and later achievements.[37] In one of the most systematic studies to date, Michigan Law School found that LSATs and GPAs did not correlate with its graduates' earned income, career satisfaction, or pro bono contributions.[38] Minorities admitted under affirmative action criteria did as well on these measures as other graduates.[39] Although national studies find that applicants of color have lower bar pass rates than whites, about eighty-five percent are successful.[40] Without affirmative action, the vast majority of these attorneys would never have had the opportunity to attend law school.

A serious commitment to diversity as well as educational quality argues both for maintaining affirmative action programs and developing more inclusive, less quantitative admission standards. As experience in some California law schools

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218-55; SMITH ET AL., *supra* note 32; ON THE IMPORTANCE OF DIVERSITY, *supra* note 32; Expert Report, *supra* note 32; Hallinan, *supra* note 32, at 746-50.

34. *See* ORFIELD & WHITLA, *supra* note 33, at 14-16.

35. ASSOCIATION OF AMERICAN LAW SCHOOLS, STATEMENT ON DIVERSITY (1998) (on file with author).

36. *See* MILES TO GO, *supra* note 22; WIGHTMAN, *supra* note 25, at 11.

37. *See* David L. Chambers et al., *Doing Well and Doing Good, The Careers of Minority and White Graduates of the University of Michigan Law School, 1970-1996*, 42 L. QUADRANGLE NOTES, Summer 1999, at 60.

38. *See id.* at 70.

39. *See id.* at 70-71.

40. *See* Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 38 (1997).

indicates, reliance on economic class as a substitute for race and ethnicity will neither ensure diversity nor capture the range of qualities likely to ensure professional success.[41] Rather, schools should follow the approach of a growing number of institutions that are experimenting with additional characteristics such as leadership ability, employment experience, community service, distinctive talents, and perseverence in the face of economic disadvantage or other hardships.[42] Consideration of such factors does, of course, carry a cost. More time is required for review of applications and more room is created for idiosyncratic bias. However, the costs of overreliance on quantitative factors are greater. Merit is an inescapably value-laden concept. There is no neutral, objective basis on which to weigh relevant characteristics. Nor is there any such foundation for determining which groups deserve special consideration and how much representation from different constituencies is appropriate. However, some evaluation processes are more defensible than others. Both the public and the profession have a stake in ensuring judgments that consider applicants' full potential and that foster diverse learning environments. As with other issues of educational structure, questions about how best to pursue these goals should be subjects of continuing experimentation and evaluation.

Similar diversity-related initiatives are necessary in other educational contexts. One area of concern involves women's underrepresentation in tenured faculty and administrative positions, and minorities' underrepresentation at all academic levels.[43] The inability to explain these disparities by objective factors should come as no surprise. Racial, ethnic, and gender biases persist within the legal profession generally, and there is no reason to expect legal education to be different.[44] But there *is* reason to expect law schools to address the issue. Without a critical mass of similar colleagues, women and minorities bear disproportionate burdens of counseling and committee assignments and lack adequate mentoring and support networks. Institutions also lose valuable guidance, and students lose valuable role models. A true commitment to diversity will require more sustained recruitment and retention efforts.

Law schools would also benefit from more effective treatment of issues related to race, gender, ethnicity, and sexual orientation throughout the educational experience. Too often, such topics are tacked on as curricular afterthoughts—as brief digressions from the "real" subject. Some teachers exclude issues of obvious importance, such as domestic violence, same-sex marriage, or racist speech, because the discussions may become too

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41. *See id.* at 40.

42. *See* LAW SCHOOL ADMISSION COUNCIL, NEW MODELS TO ASSURE DIVERSITY, FAIRNESS, AND APPROPRIATE TEST USE IN LAW SCHOOL ADMISSIONS (1999).

43. *See* WHITE, *supra* note 23; WIGHTMAN, *supra* note 25; Merritt & Reskin, *supra* note 23; *see also* Lani Guinier, *Lessons and Challenges of Becoming Gentlemen*, 24 N.Y.U. REV. L. & SOC. CHANGE 1, 12 (1998); Kacy Collons Keys, *Privileged Classes*, RECORDER, May 28, 1997, at 4; Wightman, *supra* note 40, at 40.

44. *See* MILES TO GO, *supra* note 22, at 17; RHODE, *supra* note 1, at 38-44.

volatile.[45] When such issues do arise, students who express strong views are frequently dismissed or demeaned.[46] Most institutions have experienced racist, sexist, and homophobic backlash in e-mails, graffiti, or anonymous flyers.[47] Law School Admission Council surveys find that discrimination is reported by about two-thirds of gay and lesbian students, a majority of African-American students, and a third of women, Asian-American, and Hispanic students.[48] Less systematic surveys suggest that harassment of vocal conservative students is also common.[49]

What is especially disturbing about such patterns is the tendency among some faculty to dismiss their significance. For example, when one law school published guidelines endorsing gender-neutral language in class discussions, a male professor responded by changing all "man" endings to "person," as in "Doberperson Pincher."[50] A more common faculty response is simply to ignore inappropriate comments or to let other students respond. Yet such tolerance of intolerance falls short of ensuring the equal opportunity and mutual respect that professionally responsible professional schools should demand. Sustaining these values requires active efforts to promote diversity, civility, and empathy.

These efforts should invite rethinking of other classroom structures as well. A wide variety of studies have found that female students participate less in class than their male colleagues and that women of color are most likely to feel alienated and unsupported by their law school experience.[51] Much of the problem lies in the hyper-competitive culture of many law school courses, which undermines self-esteem and discourages participation by less confident or less assertive students.

A critical first step in addressing these problems is to convince more legal educators that there *are* serious problems. To that end, law faculties should gather information from their institutions about the experience of women and minorities and the effectiveness of diversity-related initiatives.[52] Such initiatives

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45. *See* LAW SCHOOL OUTREACH PROJECT, *supra* note 24, at 39; Rhode, *supra* note 24, at 221.

46. *See* LAW SCHOOL OUTREACH PROJECT, *supra* note 24, at 39; Rhode, *supra* note 24, at 221.

47. *See* LAW SCHOOL OUTREACH PROJECT, *supra* note 24, at 39; Rhode, *supra* note 24, at 221; *see also* Janice L. Austin et al., *Results from a Survey: Gay, Lesbian, and Bisexual Student Attitudes About Law School*, 48 J. LEGAL EDUC. 157, 166-67 (1998).

48. *See* LORRAINE DUSKY, STILL UNEQUAL: THE SHAMEFUL TRUTH ABOUT WOMEN AND JUSTICE IN AMERICA 28, 39 (1996); LANI GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE 28-29, 56, 68 (1997); Austin et al., *supra* note 47, at 166; Rhode, *supra* note 24, at 220; Scott N. Ihrig, Note, *Sexual Orientation in Law School: Experiences of Gay, Lesbian and Bisexual Law Students*, 14 LAW & INEQ. 555, 568 (1996).

49. *See* Austin et al., *supra* note 47, at 166.

50. *See* LAW SCHOOL OUTREACH PROJECT, *supra* note 24, at 38.

51. *See* GUINIER ET AL., *supra* note 48, at 28-29; Elizabeth Mertz et al., *What Difference Does Difference Make? The Challenge for Legal Education*, 48 J. LEGAL EDUC. 1, 6-7, 27 (1998); Rhode, *supra* note 24, at 223.

52. *See generally* COMMISSION ON WOMEN IN THE PROF., A.B.A., DON'T JUST HEAR IT

could include workshops, lectures, and support for curricular integration. Faculty should be encouraged to develop supplemental readings, case studies, and role-playing exercises that effectively engage students on sensitive subjects. Such efforts will be effective only if legal education rearranges its reward structures. Valuing diversity must become a central mission, not just in theory, but also in practice.

III. EDUCATIONAL METHODS AND PRIORITIES

To paraphrase former Yale Law School Professor Fred Rodell, there are only two things wrong with conventional law school teaching: one is style and the other is content.[53] The dominant classroom approach is a combination of lecture and Socratic dialogue, with a focus on doctrinal analysis.[54] Although the abusive questioning styles that once were associated with Socratic methods have largely vanished, the increase in civility has deflected attention from more fundamental questions about educational effectiveness. Part of the problem is that we do not encourage law school professors to ask those questions. We do not effectively educate legal educators. Most law professors get no formal training in teaching. Nor have legal academics shown much interest in building on broader educational research about how students learn. That research underscores a number of inadequacies in traditional law school teaching.[55]

The first problem involves the overly authoritarian and competitive dynamics of many classrooms. Under conventional Socratic approaches, the professor controls the dialogue, invites the student to "guess what I'm thinking," and then inevitably finds the response lacking. The result is a climate in which "never is heard an encouraging word and . . . thoughts remain cloudy all day."[56] For too many students, the clouds never really lift until after graduation, when a commercial bar review cram course supplies what legal education missed or mystified. Highly competitive classroom environments can compound the confusion. All too often, the search for knowledge becomes a scramble for status in which participants vie with each other to impress rather than inform. Combative classroom styles also work against collaborative approaches that can be essential in practice.

That is not to suggest that Socratic techniques are entirely without educational value. In the hands of an adept professor, they cultivate useful professional skills, such as careful preparation, reasoned analysis, and fluent oral presentations. However, large-class Socratic formats have inherent limits. They discourage participation from too many students, particularly women and

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THROUGH THE GRAPEVINE: STUDYING GENDER QUESTIONS AT YOUR LAW SCHOOL (1998).

53. *See* Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936).

54. *See* Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 27-28 (1996).

55. *See id.*

56. Grant Gilmore, What is a Law School?, Address at the University of Connecticut School of Law 1982 Commencement Exercises, *in* 15 CONN. L. REV. 1, 1 (1982).

minorities, and they fail to supply enough opportunities for individual feedback and interaction, which are crucial to effective education.

These inadequacies also exact a personal price. A growing body of research suggests that the highly competitive atmosphere of law schools, coupled with the inadequacy of feedback and support structures, leaves many students with personal difficulties that set the stage for problems in their future practice.[57] Although the psychological profile of entering law school students matches that of the general public, an estimated twenty to forty percent leave with some psychological dysfunction including depression, substance abuse, and various stress related disorders.[58] These problems are not inherent byproducts of a demanding professional education; medical students do not experience similar difficulties.[59]

The law school culture can shortchange graduates in other respects as well. Despite recent improvements, most institutions do not focus sufficient attention on practical skills such as interviewing, counseling, negotiation, drafting, and problem solving.[60] The dominant texts are appellate cases, which present disputes in highly selective and neatly digested formats. Under this approach, students never encounter a "fact in the wild," buried in documents or obscured by conflicting recollections.[61] The standard casebook approach offers no sense of how problems unfolded for the lawyers or ultimately affected the parties. Nor does it adequately situate formal doctrine in social, historical, and political context. Classroom discussion often is too theoretical and not theoretical enough. It neither probes the foundations of legal doctrine, nor offers practical skills for applying doctrine in particular cases. Students get what Stanford Professor Lawrence Friedman aptly characterizes as the legal equivalent of geology without the rocks: "dry, arid logic, divorced from society."[62] Missing from this picture is the factual context needed to understand how law interacts with life.

Also absent is any sustained effort to address the interpersonal dimensions of legal practice. Law schools claim, above all else, to teach students how to "think like a lawyer." In fact, they often teach students how to think like a law professor, in a form distanced and detached from human contexts. The

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57. *See* Ann L. Iijima, *Lessons Learned: Legal Education and Law Student Dysfunction*, 48 J. LEGAL EDUC. 524, 524 (1998); Lawrence S. Krieger, *What We're Not Telling Law Students—and Lawyers—That They Really Need to Know: Some Thoughts-in-Action Toward Revitalizing the Profession from Its Roots*, 13 J.L. & HEALTH 1, 3 (1999).

58. *See* DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 910 (1995).

59. *See* Iijima, *supra* note 57, at 525.

60. *See* SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE B., A.B.A., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 234 (1992); Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 LAW & CONTEMP. PROBS. 5, 8-14 (1996).

61. CAMERON STRACHER, DOUBLE BILLING 50 (1998).

62. Lawrence Friedman, *quoted in* PAUL WICE, JUDGES AND LAWYERS: THE HUMAN SIDE OF JUSTICE 16 (1991).

psychological dimensions of lawyering are largely relegated to clinical courses. And, despite recent improvements, clinical training is still treated as a poor relation in most law schools. Without adequate resources, status, or class hours, clinical courses cannot compensate for the neglect of practical and interpersonal skills in the rest of the curricula. It is thinking about thinking—Grand Theory and doctrinal analysis—that earns greatest academic respect. As Professor Gerald López notes, law school is "still almost entirely about law and is only incidentally and superficially about lawyering."[63]

It is, moreover, about law from too insular a perspective. Despite growing recognition of the importance of cross-cultural and cross-disciplinary perspectives, the core curriculum stubbornly resists intruders.[64] With the exception of law and economics, which has managed a fair amount of infiltration, interdisciplinary perspectives generally remain on the margins. To many faculty, students, and legal employers, such law courses seem like "law and bananas": esoteric fluff largely irrelevant to practice.[65] At most schools, a bit of borrowed intellectual finery dresses up the standard legal wardrobe, but the fashion remains the same. The consequence is to deprive students of approaches that could prove highly useful in their future practice.

Problem solving is an obvious example. Although most lawyers find it central to their daily work, only a small number of schools address it directly. Adequate preparation for this role could offer background in counseling, risk analysis, game theory, and organizational behavior.[66] Similar interdisciplinary approaches could enrich understanding of other equally critical roles. Students planning to specialize in corporate law should have more exposure to economics and finance. Future matrimonial lawyers would benefit from a background in psychology. And almost all graduates, whatever their substantive interests, would be well served by more grounding in information technology, alternative dispute resolution, social science research methodology, and managerial strategies. More sequenced programs would better prepare students for many specialized practice areas.

Similar benefits would emerge from expanding clinical offerings and integrating more skills training in the core curriculum. Capacities for collaboration, legal judgment, and ethical analysis are most likely to develop through experiential learning. Simulation exercises and supervised practice offer opportunities to develop a more diverse range of skills than is possible in conventional Socratic or lecture formats. Clinics serving low-income clients offer especially valuable opportunities for students to learn how the law

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63. Gerald P. López, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305, 321-22 (1989).

64. *See* Aric Press, *We're All Connected*, AM. LAW., Nov. 1998, at 5 (noting the small number of students exposed to course work on international law).

65. *See* Arthur Austin, *Womanly Approach Harms Future Lawyers*, NAT'L L.J., May 18, 1998, at A23.

66. *See* Brest, *supra* note 60, at 12-16; Janet Reno, *Lawyers as Problem-Solvers: Keynote Address to the Association of American Law Schools*, 49 J. LEGAL EDUC. 5, 6-8 (1999).

functions, or fails to function, for the have-nots.

In principle, most law school administrators agree. They would like to offer more clinical opportunities, skills training, interdisciplinary approaches, and international perspectives. But talk is cheap and many educationally-desirable initiatives are not. There are obvious limits to how much time-intensive or specialized training law schools can provide without increasing tuition, which may further restrict access and raise student debt burdens to intolerable levels. Yet not all curricular initiatives require extensive additional resources or unreasonably burdensome faculty involvement. Much could be accomplished through greater use of interdisciplinary collaboration, on-line technology, case histories, role-playing exercises, and cooperative out-of-class projects. The problem with these strategies is generally not that they are unaffordable but rather that they are insufficiently rewarded. Improvements in the curriculum usually are not well reflected in law school rankings. Nor is excellence in teaching the path to greatest recognition for individual faculty.

Significant changes in law school curricula will require equally significant changes in law school incentive structures. A crucial first step is to develop more systematic ways of assessing educational effectiveness and holding institutions and individuals accountable. At a minimum, more information needs to be available comparing law schools on curricular issues and monitoring their efforts to insure quality. Educators need more prodding to educate themselves about effective teaching and to support curricular reforms.

IV. PROFESSIONAL RESPONSIBILITY

Law schools have always played a pivotal role in shaping professional values. But until quite recently, legal education seldom rose above one early commentator's apt characterization as "general piffle."[67] Few institutions offered any basic course in professional responsibility, and many made do with brief, ungraded lectures. Bar exams, if they addressed the topic at all, invited reflection on undemanding topics like "what the Code of Ethics means to me."[68]

In the late 1960s and early 1970s, the rise of progressive social movements brought new attention to long-standing issues of professional responsibility.[69] Lawyers' involvement in the Watergate scandal pushed the profession's public image to new lows and prodded the ABA into action. Its primary initiative was to require law schools to provide instruction on professional responsibility.[70] State bar examiners felt similar pressure and most added multiple choice ethics tests to their admission processes.[71] Such ethics requirements were not, of

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67. George P. Costigan, The Teaching of Legal Ethics, Paper Read Before the Section of Legal Education of the American Bar Association, at Saratoga Springs, N.Y. (Sept. 4, 1917), *in* 4 AM. L. SCH. REV. 290, 295 (1917).

68. Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31 (1991).

69. *See* RHODE & LUBAN, *supra* note 58, at 928.

70. *See id.* at 928-29; Rhode, *supra* note 68, at 39.

71. *See* RHODE & LUBAN, *supra* note 58, at 929; Rhode, *supra* note 68, at 40-41.

course, an obvious answer to the criminal conduct involved in Watergate. Their focus was on ensuring familiarity with bar ethical codes, and ignorance of those codes was not an obvious factor in the felonies committed by White House lawyers. Nor did the superficiality of the bar's response escape notice. As Gary Trudeau put it in one Doonesbury cartoon, these new ethics requirements seemed largely symbolic: "Trendy lip service to our better selves."[72]

Yet despite their inauspicious beginnings, these requirements produced at least some of their intended effects. They put professional responsibility on the educational agenda and laid the foundations for a respectable academic field. But progress has been uneven and the bar ethics exam has been a mixed blessing at best. Its multiple choice format trivializes many issues, and puts pressure on law school courses to focus on ABA disciplinary rules. Professors with more ambitious agendas bump up against resistance. In one all too typical case, a student was overheard advising a friend to avoid taking professional responsibility with a certain faculty member, who "asks a lot of uncomfortable questions about what you think is right [instead of] . . . teaching you the rules for the exam."[73]

The result has been to discourage the kind of inquiry that professional roles and regulation demand. Most schools offer little attention to the subject apart from a single required course that focuses primarily on bar codes of conduct; almost half offer only one course.[74] The result is too often legal ethics without the ethics.[75] Students learn the disciplinary rules but lack the foundation for critical analysis. The inadequacy of this approach is of particular concern in bar regulatory contexts where codes are ambiguous or self-serving. For example, students may learn that the ABA's rules prohibit unauthorized practice of law by nonlawyers, but not whether less restrictive licensing structures for paralegal specialists might better serve the public interest.

Doctrinal frameworks also exclude many of the crucial issues facing the American legal profession: inadequate access to justice for low to moderate income citizens; disciplinary processes that fail to provide effective remedies for most complaints; excessively adversarial norms that impose undue costs; and workplace pressures that compromise pro bono commitments. Less than a fifth of surveyed lawyers feel that legal practice has met their expectations about contributing to the social good.[76] Yet code-oriented courses fail to address the structural reasons why legal practice so often falls short.

Neither these problems, nor other common ethical dilemmas, receive significant attention outside of professional responsibility courses. This

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72. Gary Trudeau, Doonesbury (1975), *reprinted in* THOMAS D. MORGAN AND RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 1 (6th ed. 1995).

73. Daniel S. Kleinberger, *Ethos and Conscience—A Rejoinder*, 21 CONN. L. REV. 397, 401 n.23 (1989).

74. *See* Wm. Reece Smith, Jr., *Teaching and Learning Professionalism*, 32 WAKE FOREST L. REV. 613, 617 (1997).

75. *See* William H. Simon, *The Trouble with Legal Ethics*, 41 J. LEGAL EDUC. 65, 66 (1991).

76. *See* YOUNG LAWYERS DIVISION, A.B.A., CAREER SATISFACTION 11 (1995).

curricular irresponsibility toward professional responsibility is well captured in a favorite story of Supreme Court Justice Ruth Bader Ginsburg. The professor in a core first-year course was discussing a lawyer's tactic that left a student "bothered and bewildered." "But what about ethics?," the student asked. "Ethics," the professor informed him frostily, "is taught in the second year."[77] Few law schools make systematic efforts to integrate legal ethics into the core first-year or upper-level curriculum, and few casebooks outside the field provide significant coverage. In one survey, less than two percent of the total pages in leading texts touched on issues of professional responsibility.[78] The classroom treatment that does occur outside the standard course is often superficial or ad hoc, with no assigned reading and no questions on exams. Here again, students get too little theory and too little practice; classroom discussions are too uninformed by interdisciplinary frameworks and too far removed from lawyers' day to day experiences. This minimalist approach to legal ethics marginalizes its significance. What the core curriculum leaves unsaid sends a powerful message that no single required course can counteract.

The failure of legal education to make professional responsibility a professional priority has multiple causes. For nonexperts in ethics, a little knowledge feels like a dangerous thing and more is not readily accessible in standard textbooks. These problems, however, are not as imposing as faculty often assume. A substantial range of material has been developed for integrating ethical issues into the core curricula.[79] With modest effort, most law professors could readily incorporate relevant topics of professional responsibility in their substantive fields. The real problem is that most prefer not to. Some faculty doubt the value of discussing values in professional schools. From their perspective, postgraduate ethics instruction promises too little, too late. A common assumption is that moral conduct is primarily a matter of moral character. Students either "have it or they don't." As NAACP lawyer Eric Schnapper once put it, "[l]egal ethics, like politeness on subways, . . . or fidelity in marriage" cannot be acquired through classroom moralizing.[80] Even if legal education can have some effect on students' attitudes, skeptics doubt that it will significantly influence their later practice. Moral conduct is highly situational, and many educators assume that contextual pressures are likely to dwarf anything learned in law school.[81]

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77. Ruth Bader Ginsburg, *Supreme Court Pronouncements on the Conduct of Lawyers*, 1 J. INST. STUD. LEGAL ETHICS 1, 2 (1996).

78. *See* Rhode, *supra* note 68, at 41.

79. *See, e.g.*, DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (2d ed. 1998); Deborah L. Rhode, *Annotated Bibliography of Educational Materials on Legal Ethics*, 11 GEO. J. LEGAL ETHICS 1029 (1998).

80. Eric Schnapper, *The Myth of Legal Ethics*, A.B.A. J., Feb. 1978, at 202, 205.

81. *See* Deborah L. Rhode, *Into the Valley of Ethics: Professional Responsibility and Educational Reform*, 58 LAW & CONTEMP. PROBS. 139, 148-49 (1996) (examining research on factors influencing moral conduct such as authority, stress, competition, peer influence, financial incentives, time constraints, and similar pressures); Rhode, *supra* note 68, at 40-49.

Such concerns are not without force, but they suggest reasons to avoid overstating law schools' influence not to undervalue their efforts. Skeptics are correct, of course, that values do not, of themselves, determine conduct. One particularly sobering study found no significant differences between the moral beliefs of Illinois ministers and those of prison inmates.[82] Ethical behavior reflects both situational constraints and personal capacities: the ability to recognize and analyze moral issues, the motivation to act morally, and the strength to withstand external pressures.

Although not all of these characteristics can be effectively developed in law school, some are open to influence. Research on ethics education finds that moral views and strategies change significantly during early adulthood and that well-designed courses can improve capacities for ethical reasoning.[83] Despite the importance of situational pressures, moral judgment does affect moral conduct, and education can enhance that judgment. Students can benefit from exploring dilemmas of legal practice before they have a vested interest in the outcomes. Law school courses have an important role in helping future lawyers evaluate the consequences of their decisions and respond to the economic and organizational incentives underlying ethical problems.

Moreover, many crucial issues of professional responsibility are not matters on which students already have fixed views. These issues often involve complex tradeoffs among competing values and professional standards that depart from personal intuitions. Future practitioners need to learn where the bar draws the line before they risk crossing one. Since some students eventually will help determine where future lines are drawn, legal education should also provide adequate background on the policy considerations at stake. In fact, most surveyed attorneys agree. They report that the ethics instruction they received in law school has been helpful in practice and that coverage should be maintained or expanded.[84]

For some faculty, however, the greatest concerns regarding legal ethics material involve doubts not about its effectiveness, but doubts about their own. Many are wary about turning podiums into pulpits or inviting "touchy feely" digressions from "real" law. However, while many ethical questions yield no objectively valid answers, not all answers are equally valid; some are more consistent, coherent, and respectful of available evidence. So too, the risks of proselytizing are by no means unique to issues of professional responsibility. Faculty can abuse their prerogatives by self-righteous or peremptory

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82. *See* Peter Caws, *On the Teaching of Ethics in a Pluralistic Society*, HASTINGS CENTER REP., Oct. 1978, at 32.

83. *See* Albert Bandura, *Social Cognitive Theory of Moral Thought and Action*, *in* 1 HANDBOOK OF MORAL BEHAVIOR AND DEVELOPMENT 45, 53 (William M. Kurtines & Jacob L. Gewirtz eds., 1991); James R. Rest, *Can Ethics Be Taught in Professional Schools? The Psychological Research*, ETHICS: EASIER SAID THAN DONE, Winter 1988, at 22, 23-24; Rhode, *supra* note 81, at 148; Rhode, *supra* note 68, at 47.

84. *See* FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, THE MAKING OF A PUBLIC PROFESSION 176-77 (1981).

pronouncements on any subject. They do not avoid the difficulty by avoiding ethics. Rather, the answer is to educate the educators. Law professors cannot be value-neutral on matters of value. What they choose to discuss itself conveys a moral message, and silence is a powerful subtext. All too often, legal educators have substituted unimportant questions they can answer for important ones they cannot. When they decline to put ethical issues on the educational agenda, they suggest that professional responsibility is someone else's responsibility. And that encourages future practitioners to do the same.

To make professional values central in professional schools requires a significant institutional commitment. The conventional approach—add an ethics class and stir—is inadequate to the task. Professional responsibility needs to be integrated into the core curriculum, not isolated in a specialized course or trotted out on ceremonial occasions. Strategies for institutionalizing ethics are not in short supply. Law schools need to support course development and special programs related to professionalism as well as monitor their effectiveness. More attention should focus on the implicit messages in law school cultures: messages about the relative value of money, status, and social justice. More institutions should also follow the model of schools of public health and focus attention on broader issues concerning the profession's responsibility for effective regulation and delivery of professional services. Without such efforts, a wide distance will remain between the bar's rhetorical commitments and educational priorities. Students recognize this gap. Law schools should as well.

V. PROFESSIONAL VALUES AND PRO BONO OPPORTUNITIES

In 1996, the ABA amended its accreditation standards to call on schools to "encourage its students to participate in pro bono activities and provide opportunities for them to do so."[85] The revised ABA standards also encourage schools to address the obligations of faculty to the public, including participation in pro bono activities.[86] Although a growing number of schools have made efforts to increase public service, substantial challenges remain.[87] Only about ten percent of schools require pro bono participation by students, and fewer impose specific requirements on faculty.[88] Even at these schools, the obligations are sometimes quite minimal: less than eight hours of work per year.[89] Although most institutions offer voluntary public service programs, only a minority of

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85. SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE B., A.B.A., STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS 31 (1996).

86. *See id.*

87. *See* WILLIAM B. POWERS, REPORT ON LAW SCHOOL PRO BONO ACTIVITIES 2-5, 75 (1994); COMMISSION ON PRO BONO AND PUBLIC SERVICE OPPORTUNITIES, ASSOCIATION OF AMERICAN LAW SCHOOLS, LEARNING TO SERVE 4 (1999) [hereinafter LEARNING TO SERVE]; Deborah L. Rhode, *Cultures of Commitment: Pro Bono For Lawyers and Law Students*, 67 FORDHAM L. REV. 2415 (1999).

88. *See* POWERS, *supra* note 87, at 5.

89. *See id.* at 3.

students are involved. About a third of schools have no law-related pro bono projects or have programs involving fewer than fifty participants per year.[90] In short, most law students graduate without pro bono legal work as part of their educational experience.[91] As a 1999 report by the AALS Commission on Public Service and Pro Bono Opportunities concluded: "law schools can and should do more."[92]

The rationale for pro bono service by law students and faculty depends partly on the rationale for pro bono service by lawyers. This justification rests on two premises: first, that access to legal assistance is a fundamental need, and second, that lawyers have a responsibility to help make such assistance available. Although many legal educators agree, they question whether requiring pro bono contributions is a cost-effective way of addressing unmet needs. Having corporate law professors or unwilling students dabble in poverty law seems like an inefficient way to assist the poor. Yet we lack adequate experience and research to assess that objection. Many law schools have developed pro bono training and placement strategies that accommodate a wide range of interests. And some mandatory pro bono proposals would allow individuals to substitute financial support for direct service. In any event, the question is always, "Compared to what?" The current political climate offers little hope of meeting legal needs through more efficient strategies, such as adequate government funding for specialists in poverty law and public interest causes. For many low income individuals, some access to legal assistance is preferable to no access at all, which is their current situation.

Pro bono work also offers law faculty and students a range of practical benefits, such as training, trial experience, and professional contacts. For many participants, this work provides their only direct exposure to what passes for justice among the poor and to the need for legal reforms. Involvement in public service is a way for individuals to expand their perspectives, enhance their reputations, and build problem-solving skills. And for law schools, pro bono programs can be a way to generate good will with alumni and with the broader community.[93]

In addition to these educational and practical benefits, law school pro bono programs serve an equally significant purpose: to inspire long-term commitments to public service among students that will "trickle up" to the profession generally.[94] In surveys at several schools with required programs, most students report that participation has increased their willingness to provide pro bono contributions after graduation.[95] Although systematic research is

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90. *See* LEARNING TO SERVE, *supra* note 87, at 5.

91. *See id.*

92. *Id.*

93. *See id.* at 7-8.

94. *See* John R. Kramer, *Law Schools and the Delivery of Legal Services—First, Do No Harm*, *in* CIVIL JUSTICE: AN AGENDA FOR THE 1990S, at 47, 57 (Esther F. Lardent ed., 1991).

95. *See* Committee on Legal Assistance, *Mandatory Law School Pro Bono Programs: Preparing Students to Meet Their Ethical Obligations*, 50 RECORD 170, 176 (1995); Rhode, *supra*

needed to determine whether law school experiences in fact makes future service more likely, related studies of American volunteer activity point in this direction. Involvement in public service as a student increases the likelihood of later participation.[96]

Given these benefits, it is hard to find anyone who opposes law school pro bono programs, at least in principle. But in practice, there is considerably less consensus about the form that these programs should take and the priority that they should assume in a world of scarce institutional resources. According to some educators, if a law school's goal is to maximize future pro bono contributions by lawyers, then it should maximize contributions by students through required service.[97] Such requirements send the message that pro bono work is a professional obligation and may convert some individuals who would not have voluntarily participated.[98] Yet we lack sufficient research to determine whether mandatory programs in fact yield greater long term pro bono contributions than well-supported optional alternatives. Some law school administrators worry that required participation may produce incompetent service by unmotivated students, and may undermine the voluntary ethic that is necessary to sustain commitment after graduation.[99] Particularly for schools outside urban areas, it can also be difficult to find sufficient public interest opportunities to accommodate the skills, schedules, and time constraints of all graduating students. Yet voluntary pro bono programs also have limitations. At most schools, they attract relatively small numbers of participants, modest institutional resources, and few efforts at quality control.[100]

Although different institutions may resolve those tradeoffs differently, they have a shared responsibility to promote commitments to public service. At a minimum, all law schools should follow the primary recommendation of the AALS Commission: they should "seek to make available for every student at least one well-supervised pro bono opportunity and either require student participation or find ways to attract the great majority of students to volunteer."[101] Schools should also establish policies that encourage professors to meet the ABA standard of fifty hours per year of pro bono service or the financial equivalent. Research on volunteer activity finds that students learn better by example than exhortation. If faculty are unwilling to practice the pro bono that they preach, they again reinforce the message that professional

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note 87, at 2434.

96. *See* VIRGINIA A. HODGKINSON ET AL., GIVING AND VOLUNTEERING IN THE UNITED STATES: FINDINGS FROM A NATIONAL SURVEY 12-13, 87-88 (1996).

97. *See* Notes of Focus Group Interviews Conducted by the AALS's Commission on Pro Bono and Public Service Opportunities in Law Schools (1998) (on file with author) [hereinafter Focus Group Interview Notes].

98. *See* Mark S. Sobus, *Mandating Community Service: Psychological Implications of Requiring Prosocial Behavior*, 19 LAW & PSYCHOL. REV. 153, 164, 170 (1995).

99. *See* Focus Group Interview Notes, *supra* note 97.

100. *See* LEARNING TO SERVE, *supra* note 87, at 5.

101. Deborah L. Rhode, *Foreword* to LEARNING TO SERVE, *supra* note 87, at viii.

responsibility is everyone else's responsibility. Mark Twain was, of course, correct that "[t]o do good is noble. To teach others to do good is nobler, and no trouble [to yourself]."[102] However, law schools could do more to reduce the difficulties and increase the incentives associated with public service. More adequate resources and recognition are obvious strategies. Legal education has a unique opportunity and a corresponding obligation to make pro bono involvement a rewarding and rewarded opportunity.

Finally, and most important, pro bono strategies need to be part of broader efforts to encourage a sense of professional responsibility for the public interest. Research on legal education suggests that the "latent curriculum" at most law schools works against that sense of responsibility. Traditional teaching methods leave many students skeptical at best and cynical at worst about issues of social justice: "there is always an argument the other way, and the Devil usually has a very good case."[103] At most institutions, the standard curriculum fails to engage students in any searching scrutiny of what they want to do in the world. Legal coursework often seems largely a matter of technical craft, divorced from the broader social concerns that led many students to law school. Individuals who enter law school talking about justice often leave talking about jobs.[104]

Countering these forces will require a substantial commitment. But there is much to gain and little to lose from the effort. Enlarging students' sense of professional responsibility reinforces their best instincts and aspirations. By making professionalism a priority, law school faculty can reinforce the same aspirations in themselves.

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102. Mark Twain, *quoted in* Rhode, *supra* note 87, at 2415.

103. Stewart Macaulay, *Law Schools and the World Outside Their Doors II: Some Notes on Two Recent Studies of the Chicago Bar*, 32 J. LEGAL EDUC. 506, 524 (1982).

104. *See* ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND 38-39 (1992).

TEMPORARY DISTANCE EDUCATION GUIDELINES PROVIDE OPPORTUNITIES FOR FLEXIBILITY AND INNOVATION

HARRY J. HAYNSWORTH*

Professor Rhode's paper is both elegant and provocative, and I concur with most of her critique of current legal education.[1] I disagree, however, with her conclusion that the American Bar Association (ABA) Law School Accreditation Standards (Standards) inhibit needed structural changes in legal education.

By Rhode's assessment, the current Standards represent "a one-size-fits-all accreditation framework" that is overly rigid and does not allow for sufficient flexibility or experimentation.[2] This criticism of the Standards is quite common and has become a mantra in virtually all critiques of American legal education. However, from my own experience, I do not believe that the "one-size-fits-all framework" has ever existed. In the approximately twenty-five years I have served on ABA site evaluation teams, each law school I have inspected has unique features and customs. The differences between these law schools have been at least as striking as their similarities. Moreover, even if this criticism was accurate in the past, it clearly is not the case today.

In 1996 after years of study and hearings, a complete new set of standards was adopted by the ABA Section of Legal Education and Admissions to the Bar.[3] The 1996 Standards are much broader and less detailed in many respects than the previous set of Standards. Furthermore, each chapter of the Standards must be periodically reviewed and updated.[4] This review process will take approximately six years. Additionally, several changes have been incorporated in the chapters revised since 1996. For example, recently approved changes in Chapter Six of the Standards dealing with law school libraries include several provisions requiring that law libraries have adequate technological capacities and electronic informational services.[5] Therefore, the required review process of the Standards, coupled with their approved modification, allow appropriate evolution to accommodate developmental changes in legal education.

The current Standards also allow far more flexibility and room for experimentation than Professor Rhode and other critics of the accreditation rules realize. The existing rules and guidelines regarding various distance learning techniques are a good example. Standard 304(g), states the general rule on this issue: "A law school shall not grant credit for study by correspondence. A law

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1. Deborah L. Rhode, *Legal Education: Professional Interests and Public Values*, 34 IND. L. REV. 23 (2000).

2. *Id.* at 28.

3. *See* SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE B., A.B.A., STANDARDS FOR APPROVAL OF LAW SCHOOLS 23 (1999) [hereinafter STANDARDS FOR APPROVAL OF LAW SCHOOLS].

4. *See id.* at 24.

5. *See* SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE B., A.B.A., PROPOSED CHANGES TO THE STANDARDS ADOPTED (2000). The proposed changes in chapters 5, 6, and 7 were approved by the ABA House of Delegates on July 10, 2000. *See id.*

school may grant credit for distance learning study in accordance with such temporary or permanent guidelines as are authorized by the Council [of the American Bar Association of Legal Education and Admissions to the Bar]."[6]

In 1997, in accordance with Standard 304(g), the Council approved the Temporary Distance Education Guidelines (Temporary Guidelines) developed by the Accreditation Committee.[7] Permanent guidelines are expected at some unspecified point in the future.[8]

At first blush, the Temporary Guidelines appear to be very restrictive. A closer reading, however, indicates that the Temporary Guidelines allow law schools a great deal of flexibility in their use of various distance learning methodologies, and advanced approval for such courses is only required in a very limited number of circumstances where classroom-free learning is the principal course format.

Five categories of courses are discussed in the Temporary Guidelines. Three do not require any prior approval by the Consultant or the Accreditation Committee. The three categories are listed below.

1. Live Dissemination of J.D. Courses from One Law School to Another Law School.—Live dissemination of courses require only the use of appropriate technology and opportunities for immediate interactivity.[9] These requirements cover courses offered live at one law school (or originated at a non-law school site) and delivered live on-site to a classroom in another law school by means of satellite transmission or on the Internet through teleconferencing equipment.[10] Several courses of this type have been offered by law schools in recent years and the technology for delivering these courses is becoming more widely available and less expensive.[11]

2. Distance Learning Enhancements of Regular Classroom-based Courses and Distance Learning Classroom Components of Externships and Clinics.—Similarly, the Temporary Guidelines specifically authorize the use of distance learning techniques for delivering classroom components to off-site externships

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6. STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 3, Standard 304(g), at 42.

7. *See* Memorandum D9697-59 from James P. White, Consultant on Legal Education to the American Bar Association, to Deans of A.B.A. Approved Law Schools (May 6, 1997) (on file with author) [hereinafter Distance Education Memorandum].

8. *See id.* The Distance Education Memorandum contemplates that information reports on distance learning courses requiring approval will be sent to the Consultant's office. These reports will be submitted to the Section of Legal Education and Admissions to the Bar Technology Committee. That committee will, at the appropriate time, develop a set of permanent distance education guidelines, which will then be reviewed by the Section's Standards Review and Accreditation Committees, and ultimately approved by the Council. *See id.* at 1-2.

9. *See id.* at 3, 5. It is not necessary that a faculty person be present in the classroom receiving the transmission. *See id.* at 3.

10. *See id.*

11. *See* Stephen M. Johnson, *www.lawschool.edu: Legal Education in the Digital Age*, 2000 WIS. L. REV. 85, 98.

and clinical courses.[12] In accordance with the Temporary Guidelines, the distance learning components must also be delivered with appropriate technology coupled with opportunities for interactivity.[13]

The rationale behind the externship and clinical distance learning exception to prior approval also applies to a wide variety of technological methodologies used to supplement or enhance otherwise traditional law school classroom courses, including out-of-class Computer Assisted Legal Instruction ("CALI") exercises, CD-ROM formatted course materials, course websites that include a syllabus, electronic "handouts," electronic course books, hyperlinks to other websites containing material relevant to the course, online quizzes, e-mail, and Internet discussion groups, all of which are widely used by law schools across the country.[14]

William Mitchell College of Law, for example, uses a software program developed by Lexis called "Web-Course-in-a-Box" that allows both synchronous and asynchronous communications between individual students as well as between the students and their classroom professors. During the 1999-2000 academic year, this software was used in approximately fourteen courses and in all thirty sections of the first-year writing program each semester, even though these types of distance learning course enhancements are not specifically mentioned in the Temporary Guidelines. However, no one, to the best of my knowledge, thinks that prior consent from the Consultant or the Accreditation Committee is necessary, assuming they meet the appropriate technology and interactivity requirements.[15] Moreover, knowledge that these classroom enhancement techniques are being used is widespread, and neither the Consultant nor the Accreditation Committee has indicated any concern about their use.[16]

3. Post J.D. Programs Such as LL.M. and S.J.D. Programs.[17]—No prior

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12. *See* Distance Education Memorandum, *supra* note 7, at 4.

13. *See id.*

14. *See* Johnson, *supra* note 11, at 92-96.

15. *See* Distance Education Memorandum, *supra* note 7, at 5. Interactivity and appropriate technology are requirements for all the different types of distance learning discussed.

16. *See id.* at 3. Paragraph 1 of the Temporary Distance Education Guidelines contains very broad language indicating that requests for approval of distance learning programs for first-year courses "will not usually be approved." *Id.* at 4. The stated reason is "the special developmental and interactive nature of first year courses." *Id.* My interpretation of this language is that it only applies to live transmission courses that fall within category 1. *See supra* notes 9-11 and accompanying text. Therefore, it should be permissible to use classroom enhancement forms of technology for first-year classes without any prior approval under paragraph 2 of the Temporary Guidelines. *See id.* William Mitchell College of Law has been using Web-Course-in-a-Box and other classroom enhancement technology methodologies in first-year courses for several years. Other law schools have also reached the same conclusion. *See* Jayne Elizabeth Zanglein & Katherine Austin Stalcup, *Te(a)chnology: Web-Based Instruction in Legal Skills Courses*, 49 J. LEGAL EDUC. 480, 494 (1999) (describing the computer technology incorporated into a first-year legal writing course at Texas Tech University School of Law).

17. *See* Distance Education Memorandum, *supra* note 7, at 5.

approval from either the Consultant or the Accreditation Committee is required simply because a graduate law degree has distance learning components.[18] Graduate degree programs must, however, receive acquiescence from the Council, but the requirements for acquiescence are the same, whether or not the post J.D. program contains distance learning components.[19] In 1998, the Council acquiesced to an Internet-based LL.M. in International Taxation offered by Regent University School of Law located in Norfolk, Virginia.[20] The law school's use of the Internet appeared to satisfy the technology requirement, and the electronic chat room and e-mail components of the program satisfied the interactivity requirement in the Temporary Guidelines.

In contrast to the three types of courses addressed above, the fourth and fifth categories discussed in the Temporary Guidelines and the Distance Education Memorandum require advance approval from the Consultant or Accreditation Committee. These two categories are listed below:

4. Experimental Courses.—Distance learning experimental courses that do not fit into any of the three categories discussed above can be approved by the Consultant's office on an individual basis. However, a student is only permitted to take a maximum of one three-credit hour experimental course for the purpose of satisfying the class hour and residency requirements in the Standards.[21] The Temporary Guidelines specify that approval of experimental courses, designated as "limited exceptions," is discretionary and based "upon a showing of specific educational benefits" provided by the courses.[22]

As of March 2000, the Consultant had approved six of seven experimental course applications.[23] One of them, an application for two Internet based courses offered by Syracuse University College of Law in the spring of 1998, probably did not require pre-approval because no students from Syracuse College of Law

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18. *See id.* The Temporary Guidelines indicate that prior approval for post-J.D. distance learning courses might be required. *See id.* However, the Temporary Guidelines state that courses described in paragraph 4 do not require prior approval from the Accreditation Committee or the Consultant's office. *See id.* at 1.

19. *See* STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 3, Standard 307, at 47. The principal requirements for acquiescence are: (1) that the post-J.D. degree program will not divert teaching resources from the J.D. program and (2) that the post-J.D. program will have sufficient administrative and teaching resources to meet the program's objectives. *See id.*

20. *See* Johnson, *supra* note 11, at 123.

21. *See* Distance Education Memorandum, *supra* note 7, at 4.

22. *Id.*

23. The application that was not approved was for an online survey course on commercial law scheduled by the University of Tennessee College of Law in the summer of 2000. It was rejected on the grounds that the course lacked any evidence of interactivity between the faculty member teaching the course and the students. *See* Letter from J. Richard Hurt, Deputy Consultant on Legal Education, to Thomas C. Galligan, Jr., Dean, University of Tennessee College of Law (Mar. 23, 2000) (on file with the author). A revised application was filed and this course was subsequently approved. Telephone interview with J. Richard Hurt, Deputy Consultant on Legal Education (June 29, 2000).

enrolled in the courses.[24] Two others involved interactive television courses offered live at one location and remotely at one or more additional locations that were not at a law school. The first was a 1998 summer course in Federal Taxation of Gratuitous Transfers taught live from a distance learning studio located on the University of Mississippi campus in Oxford, Mississippi, and transmitted to University of Mississippi Law Center students at three remote University of Mississippi campuses.[25] The other was a course in Alternative Dispute Resolution offered by West Virginia University College of Law during the summer of 1999 at the West Virginia University campus in Morgantown and transmitted remotely to West Virginia University College of Law students located at a branch campus of the University in Charleston, West Virginia, through dedicated T-1 telephone lines that simultaneously sent video and sound.[26] In addition to the usual classroom interaction at both sites, all students enrolled in this course were required to engage in various role-plays and videotaped performance exercises (negotiations and mediations). The instructor for the course was available to the students at both locations by telephone and e-mail.[27]

Another application approved under the experimental course guidelines was for an Internet-only section of a seminar on controlled substances taught at South Texas College of Law in the fall of 1999.[28] An additional section of the course was taught in a traditional classroom setting. The most interesting aspect of this experiment was the law school's ability to compare the students' performance in the different course sections because all the students were graded primarily on the basis of a research paper. Professor Buford Terrell, who taught both sections, filed a report in the Consultant's office after the course was completed. It states: "The final papers were graded with the same criteria in both sections, and there were no grade differences that were attributable to the section or the methodology."[29] Professor Terrell also discussed the benefits of the Web-based format:

> First, the class "discussion" method drew out more frequent, more

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24. *See* Letter from Arthur R. Gaudio, Deputy Consultant on Legal Education, to Daan Braveman, Dean, Syracuse University College of Law (Dec. 1, 1997) (on file with the author).

25. *See* Letter from Arthur R. Gaudio, Deputy Consultant on Legal Education, to Larry S. Bush, Associate Dean, University of Mississippi Law Center (Feb. 6, 1998) (on file with the author).

26. *See* Letter from J. Richard Hurt, Deputy Consultant on Legal Education, to John Fisher, Dean, West Virginia University College of Law (May 3, 1999) (on file with the author). Neither this course nor the distance learning tax course at the University of Mississippi were exempt from prior approval under paragraph 1 of the Temporary Guidelines because the sites receiving the remote transmission were not located in a law school.

27. *See id.*

28. *See* Letter from J. Richard Hurt, Deputy Consultant on Legal Education, to Jeffrey L. Rensberger, Associate Dean, South Texas College of Law (June 21, 1999) (on file with the author).

29. Letter from Jeffrey L. Rensberger, Associate Dean, South Texas College of Law, to J. Richard Hurt, Deputy Consultant on Legal Education (Feb. 24, 2000) (on file with the author).

> analytic, and better-conceived comments and arguments from the students than they normally demonstrate in a classroom. Second, students showed considerable initiative in originating and carrying forward discussion topics. The students demonstrated creativity in solving the problems of web-based presentations and multi-media communications. Third, the students were able to follow, to some extent, a self-paced and self-scheduled course of work, giving them freedom. Fourth, as a whole the class became very proficient in using Web resources as part of their learning and research.[30]

The final two experimental course applications approved by the Consultant were stand-alone online courses. The first, an online course on Computer Assisted Legal Research taught during the summer of 2000 at St. Thomas University School of Law, seems to be naturally suited for a distance learning format.[31] This course was instructed through the incorporation of a number of different technological methodologies and software programs, including: Web-Course-in-a-Box; videotaped lectures delivered on a CD-ROM; Catch the Web; FrontPage; Net Meeting; threaded discussions; and weekly chat room discussions.[32]

The second course, a Cybercrimes Seminar, also presented a natural forum for a distance learning format.[33] In my opinion, so far it is the most interesting and innovative of all the distance learning experimental courses that have been

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30. *Id.* These favorable comments about the level of learning that occurred in the online section of the course are echoed in the report on the West Virginia Alternative Dispute Resolution experimental course offered by the West Virginia University College of Law. The report submitted to the Consultant's office on the West Virginia course states:

> Professor Patrick is of the view that students at the distance site enjoyed as good a learning experience as students in the local classroom .... Professor Patrick notes little difference in student participation in the learning experience. In addition, Professor Patrick believes that the students at the distance site learned as much as those at the local site. In terms of the student engagement and the quality of students' submissions, Professor Patrick notes no differences between students in the distance classroom and those on campus.

Letter from John W. Fisher, Dean, West Virginia University College of Law, to J. Richard Hurt, Deputy Consultant on Legal Education (Oct. 14, 1999) (on file with the author).

31. *See* Letter from to J. Richard Hurt, Deputy Consultant on Legal Education, to Jay Silver, Associate Dean, St. Thomas University School of Law (Mar. 23, 2000) (on file with the author).

32. *See* Letter from Jay Silver, Associate Dean, St. Thomas University School of Law, to James White, Consultant on Legal Education (Dec. 7, 1999) (on file with the author).

33. This seminar was initially approved for the fall 1998 semester. *See* Letter from Arthur R. Gaudio, Deputy Consultant for Legal Education, to Francis J. Conte, Dean, University of Dayton School of Law (May 22, 1998) (on file with the author). It was also subsequently approved for the fall 1999 semester. *See* E-mail from J. Richard Hurt, Deputy Consultant on Legal Education, to Susan W. Brenner, Associate Dean, University of Dayton School of Law (May 2, 1999) (on file with the author).

approved under the Temporary Guidelines.[34]

Three features of the Cybercrimes Seminar are of particular interest. The first was its use of experts from across the country as assistants in the course. These experts regularly participated in the online class discussions, and also critiqued the statutory provisions drafted by the students.[35] The second was the seminar's use of a software program developed at the University of British Columbia which allowed the instructor to track how often each student logged into the class, how many areas in the website were visited by each student, how many assigned items each student read, and how many messages each student posted during the course.[36]

The third interesting feature was the legal skills training incorporated into the course. In this course, students were required to draft specific provisions for a Model Cybercrimes Code. In fact, seventy percent of the final grade was based on the quality of the students' Model Code sections and commentary.[37] Teaching legal skills in a distance learning format is very controversial.[38] The favorable report by Professor Susan Brenner on the Cybercrimes Seminar indicates that at least some legal skills, in this case online legal research, collaboration, and legislative drafting skills, can be taught on a distance learning basis.[39] In fact, according to Professor Brenner, it may be easier in an online format for students to review, discuss, and critique the drafting of their fellow students than in a live classroom setting.[40]

5. Any Other Course.—This category consists of any course that cannot qualify under one of the other four categories. Given the breadth of the kinds of technologies and formats that can be authorized under the other four categories, it is hard to envision a course that would fall into this last category. If there is such a course, it would require a waiver or variance from the Council.[41] Waivers, which are rarely approved, are authorized when "the proposal is nevertheless consistent with the general purposes of the Standards."[42]

CONCLUSION

The available evidence indicates that many law schools are experimenting with various types of distance learning methodologies.[43] Under the Temporary

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34. *See* Susan Brenner, Report: The Online Seminar Taught at the University of Dayton School of Law in the Fall of 1998 Pursuant to the May 7, 1997 Temporary Distance Learning Guidelines (Spring 1999), at 2-4, 12-14 (on file with author) [hereinafter The Online Seminar].

35. *See id.* at 2-4, 12-14.

36. *See id.* at 7-8.

37. *See id.* at 4.

38. *See* Johnson, *supra* note 11, at 108-10.

39. *See* The Online Seminar, *supra* note 34, at 17.

40. *See id.*

41. *See* Distance Education Memorandum, *supra* note 7, at 1.

42. STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 3, Standard 802, at 66.

43. *See generally* Johnson, *supra* note 11, at 98.

Guidelines they are generally able to do so without any prior approval from the Council of the ABA Section of Legal Education and Admissions to the Bar. While it is not permissible under the current Standards to have a completely online J.D. program like the one being offered by Concord School of Law in California,[44] the Temporary Guidelines allow for an appropriate, but not excessive, amount of flexibility for distance learning experimentation and innovation to take place.

Given the small number of applications filed for experimental course credits in the three years the Temporary Guidelines have been in effect, there does not presently appear to be a great demand for distance learning courses that lack a significant live classroom component. Moreover, even though distance learning is being widely used in other disciplines, the pedagogical assessments of these other programs have been mixed.[45] Similarly, the successful use of a particular distance learning format in one field is not a guarantee that it will be equally successful in another field.

In conclusion, James P. White, who is retiring after a distinguished career as the Consultant on Legal Education and Consultant to the American Bar Association Section of Legal Education and Admissions to the Bar, should be praised for facilitating the flexibility incorporated into the Temporary Distance Education Guidelines. In due course, assuming various distance learning methodologies are proven to be pedagogically sound[46] and the demand increases for instruction that requires advanced approval as experimental courses, the permanent Guidelines, and ultimately the Standards for Approval of Law Schools, should be changed to accommodate these developments.

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44. Many of the Standards for Approval of Law Schools would have to be amended in order to allow a school like Concord to be accredited by the ABA. *See, e.g.*, STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 3, Standard 302(d), at 41 ("A law school shall offer live-client or other real-life practice experiences."); Standard 304(a), at 42 ("An academic year shall consist of not fewer than 130 days on which classes are regularly scheduled *in the law school*....") (emphasis added).

45. *See, e.g.*, Jamie P. Merisotis & Ronald A. Phipps, *What's the Difference?—Outcomes of Distance vs. Traditional Classroom-Based Learning*, CHANGE, May-June 1999, at 12, 13-17; Ed Neal, *Using Technology in Teaching: We Need to Exercise Healthy Skepticism*, CHRON. HIGHER EDUC., July 19, 1998, at 84. *See also* Johnson, *supra* note 11, at 104-14 (discussing the disadvantages and limitations of distance learning in law schools).

46. *See generally* Zanglein & Stalcup, *supra* note 16, at 492-94 (discussing the pedagogical attributes of web-based instruction).

THE CHALLENGE TO DIVERSITY IN LEGAL EDUCATION

HERMA HILL KAY*

INTRODUCTION: FROM SEGREGATION TO AFFIRMATIVE ACTION

I would like to address the challenge of maintaining diversity in legal education. For a few law schools, including my own, recent decisions and legislation in this area have resulted in a struggle to maintain diversity without using race or ethnicity as criteria for admission. I do not offer here a paper on the constitutionality of affirmative action. Instead, I will speak in somewhat personal terms, because I believe that all of us must examine our own beliefs, feelings, and experiences about these matters before we can understand and communicate our views to each other.

I was born in South Carolina in 1934 and, except for a brief stint in Texas, spent my childhood there. In South Carolina I lived in a segregated society and attended first grade in an all-white school. The churches where my father served as minister had no black members. My mother, a third-grade school teacher, had no black students in her class. My earliest impression of the black people who lived in my rural community was that they worked as servants, tenant farmers, or in other low-income jobs. Except for the black ministers who sometimes met with my father, I do not remember ever having seen a black man wearing a suit and tie.

Although I did not realize it at the time, the South Carolina of my childhood also offered few options to white women. My mother had been a grammar school teacher when she and my father married. After taking a few years off following my birth, she resumed teaching when I was about three—a rare occurrence for white women with young children in those days. When my sixth grade Civics teacher suggested that I go to law school (after a class debate in which I successfully argued the negative of the question, "Resolved, The South Should Have Won the Civil War"), my mother did not encourage the idea. She told me in no uncertain terms that women could not support themselves in the practice of law and that I would be better off with a teacher's credential.

I graduated from high school in 1952 and left South Carolina, never to return. I entered college at SMU where, out of deference to my mother, I enrolled in elementary education courses, but soon changed my major to the more challenging subject of English Literature, with a minor in Philosophy. At SMU, for the first time, I had black and a few Asian and Mexican-American classmates. *Brown v. Board of Education*[1] was decided in 1954 as I was finishing my sophomore year. Reflecting on discussions of that landmark case and its consequences, I came to see the segregated South of my childhood as a society that was unfair and unjust. I was even more determined to realize my goal of

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1. 347 U.S. 483 (1954).

attending law school so that I could help change things for the better. In my innocence, I did not yet realize that I might encounter obstacles to my plans because I was a woman.

When I started law school in 1956 at the University of Chicago, I was particularly interested in the civil rights cases we studied in Constitutional Law and in the legal interpretation of the most fundamental concept of our nation's vision of itself: the concept boldly proclaimed in 1776 in the Declaration of Independence that "all men are created equal." I learned that less than 100 years after those words were included in the Declaration of Independence, the Supreme Court held that they did not apply to black men because, as Chief Justice Taney observed in *Dred Scott v. Sandford*,[2] public opinion in 1776 would have been that members of the black race "had no rights which the white man was bound to respect."[3]

Dred Scott interpreted the words of the Declaration of Independence too narrowly to encompass the fundamental principle of equality they had appeared to enshrine. Less than ten years after the decision was announced, the true meaning of those words was tested on the battlefield. As President Abraham Lincoln said in the opening sentences of his Gettysburg Address on November 19, 1863:

> Fourscore and seven years ago our fathers brought forth on this continent a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal.
>
> Now we are engaged in a great civil war, testing whether that nation, or any nation, so conceived and so dedicated, can long endure.[4]

After the Civil War had been fought, the South defeated, and slavery abolished by the Thirteenth Amendment,[5] a new guarantee of equal protection was enshrined in the Fourteenth Amendment,[6] and the Supreme Court was again called upon to consider the legal concept of racial equality. Once more, the

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2. 60 U.S. 393 (1856) (rejecting the claim of a Negro slave that he had been freed when his master took him from a slave state into a free state and holding that petitioner was not a citizen of the United States who was competent to sue in the federal courts).

3. *Id.* at 407. *See* Pauline Maier, *The Strange History of "All Men Are Created Equal,"* 56 WASH. & LEE L. REV. 873 (1999) (discussing the contemporary understanding of the text).

4. J.W. FESLER, LINCOLN'S GETTYSBURG ADDRESS (Nov. 19, 1943) (a paper read before the Indianapolis Literary Club on the eightieth anniversary of the delivery of the Gettysburg Address), *in Indiana Magazine of History*, XL, No. 3, Sept. 1944.

5. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

6. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or imunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

Court failed to rise to the occasion. In *Plessy v. Ferguson*,[7] a majority held that the equal protection clause did not invalidate a Louisiana statute which required black and white citizens to travel in separate railroad carriages.[8] Justice Brown wrote:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. . . . If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.[9]

Based on my own experience growing up in rural South Carolina, I did not agree that plaintiff's argument was fallacious. I had seen first hand the countless indignities imposed on black people: the separate bathrooms, the "black balcony" in movie theaters, the separate lunch counters, even the separate drinking fountains. All these so-called "separate but equal" facilities added up to an unmistakable message: white and black must be kept separate because black is inferior. Even before I encountered the phrase "badge of servitude"[10] in Justice Harlan's dissenting opinion, I recognized the weight of its daily oppression. The majority opinion in *Plessy* seemed to me to be a repudiation of the great principle for which the Civil War had been fought.

The *Plessy* Court's flawed interpretation of the Fourteenth Amendment was finally corrected by the case that was decided while I was in college, *Brown v. Board of Education*,[11] which repudiated *Plessy*'s "separate but equal" doctrine.[12] In this opinion, Chief Justice Warren examined the effect of segregation on public education. He drew on the finding of a Kansas court that:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly)

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7. 163 U.S. 537 (1896).

8. *See id.* at 552.

9. *Id.* at 551-52.

10. *See id.* at 555 (Harlan, J., dissenting). I agree entirely with Professor Jed Rubenfeld's reading of the paradigm racial separation equal protection cases from *Plessey* to *Brown* and beyond. The system they scrutinized, and ultimately invalidated, was a caste system purposefully designed to make African-Americans a class of untouchables. *See* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 455-61 (1997).

11. 347 U.S. 483 (1954).

12. *Id.* at 494-95.

integrated school system.[13]

I am able to confirm this analysis based on my own experience of segregated schools. Living in a society where children my own age were sent to different schools felt very strange to me. It seemed that their world was closed to me just as mine was closed to them. Looking back, I believe I was deprived of the benefits of association in an educational setting with the black children who were my contemporaries. Had I not been denied that opportunity, I might have come to understand much earlier the injustice of the society in which I lived and studied.

In its subsequent opinion in *Brown II*, the Court ordered that its ruling be implemented "with all deliberate speed."[14] This order was resisted, however, both in the courtroom and at the ballot box, for ten long years. Professor Walter E. Dellinger, III, recalls being in a seventh grade classroom in North Carolina on the day *Brown* was decided and hearing his teacher declare in solemn tones, "Children . . . the Supreme Court has ruled. Next year you will go to school with colored children."[15] Dellinger, who was thirteen at the time, went on to recount his personal experience of the meaning of "all deliberate speed":

> Our teacher's assumption about the effect of *Brown v. Board of Education* on the racial composition of our public school turned out to be erroneous. We did not "go to school with colored children" the next year as he had naturally assumed. Or the year thereafter. In fact, I finished junior high and graduated from a still all-white high school in 1959 without ever having attended school with a black child. By the time I finished four years at the state university, the public schools of North Carolina remained almost entirely segregated; more than 99 percent of the state's black children attended all-black schools. It was not until the 1972-73 school year (I had by then been through law school, clerked, and become a law professor) that there was finally a meaningful end to the *de jure* segregation of the public schools of the rural and small-town South.[16]

While the rural South persisted in opposing desegregation in the public schools, law school faculties were leading the way toward proactive measures designed to increase diversity in legal education and, as a consequence, in the legal profession. Terrance Sandalow recalls that "[d]uring the academic year 1965-66, at the height of the civil rights movement, the University of Michigan Law School faculty looked around and saw not a single African-American

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13. *Id.* at 494 (citations omitted).

14. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

15. Walter Dellinger, *A Southern White Recalls a Moral Revolution*, WASH. POST, May 15, 1994, at C1.

16. *Id. See also* Richard E. Jones, Brown v. Board of Education*: Concluding Unfinished Business*, 39 WASHBURN L.J. 184, 195 (2000) (pointing out that *Brown* was not finally implemented in the Topeka, Kansas, school district until the fall of 1996).

student."[17] At Berkeley, where Dean Henry Ramsey remembers having been the only African-American in the entering class of 1960,[18] the assassination of Reverend Martin Luther King, Jr. on April 4, 1968 shocked the faculty into action. Shortly thereafter, both schools initiated programs designed to increase their minority enrollment. At Michigan, "the faculty directed its admission officer to recruit black applicants and, if necessary to achieve a reasonable number of blacks in the student body, to admit black applicants who seemed likely to complete the School's program whether or not they satisfied the admission standards required of other applicants."[19] At Berkeley, the faculty decided to give "special consideration" to minority applicants, with the result that the percentage of minority students (chiefly African-Americans, Chicanos and other Hispanics) grew from seven percent of the entering class in 1968 to thirty-three percent in 1972.[20]

It bears emphasizing that these practices were adopted before the Congressional mandate of non-discrimination in employment, Title VII of the Civil Rights Act of 1964,[21] was extended to higher education in 1972,[22] or even before either the American Bar Association (ABA)[23] or the Association of American Law Schools (AALS)[24] required law schools to undertake efforts to

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17. Terrance Sandalow, *Identity and Equality: Minority Preferences Reconsidered*, 99 MICH. L. REV. 1874, 1874 (1999) (reviewing WILLIAM J. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER (1998)).

18. *See* Henry Ramsey, Jr., *Closing the Door on Tomorrow's Leaders*, WASH. POST, Aug. 13, 1997, at A21.

19. Sandalow, *supra* note 17, at 1874.

20. *See* Feature, *The History of Affirmative Action at Boalt*, BOALT HALL TRANSCRIPT, Spring 1995, at 21, 22.

21. 42 U.S.C. §§ 2000e-15 (1999).

22. *See* Higher Education Amendments Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103 (1972).

23. *See* ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 211 (1999) (adopted in 1980 as Standard 212).

> Equal Opportunity Effort. Consistent with sound legal education policy and the Standards, a law school shall demonstrate, or have carried out and maintained, by concrete action, a commitment to providing full opportunities for the study of law and entry into the profession by qualified members of groups, notably racial and ethnic minorities, which have been victims of discrimination in various forms. This commitment typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, and a program that assists in meeting the unusual financial needs of many of these students, but a law school is not obligated to apply standards for the award of financial assistance different from those applied to other students.

Id.

24. *See* ASSOCIATION OF AMERICAN LAW SCHOOLS, 1999 HANDBOOK, Bylaw 6-4(c) (1999) [hereinafter AALS 1999 HANDBOOK]. "Diversity: Non-Discrimination and Affirmative Action. .... A member school shall seek to have a faculty, staff, and student body which are diverse with

provide equal opportunity for students of all races. As Berkeley Professor Jan Vetter, who served on the school's first affirmative action committee, put the matter in 1995, "[w]e thought it was a good idea. We still do."[25]

Of course, not everyone agreed. Professor Lino A. Graglia of the University of Texas Law School was an early and prominent opponent of race-conscious admission programs.[26] By the early 1970s, when Dellinger felt the mandate of *Brown II* had finally ended segregation in public grade and high schools even in the rural South,[27] legal education, along with other professional schools and many undergraduate programs had adopted affirmative action admission programs to ensure integration in higher education.[28]

The law schools did not attempt to disguise or misrepresent the nature of these programs. Thus it is surprising that Professor Stephan Thernstrom has tried to suggest otherwise by quoting out of context a statement I made about affirmative action in hiring on the *McNeil-Lehrer Newshour*. He quotes me as saying that affirmative action is a matter of having "to choose between two equally qualified persons."[29] This part of the quote is accurate, but its context is distorted. Thernstrom applies it to admissions decisions, and characterizes it as a misrepresentation of the relative qualifications of white and minority law school applicants.[30] This characterization, however, conflates my answers to two

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respect to race, color, and sex. A member school may pursue additional affirmative action objectives." *Id.*

25. Feature, *supra* note 20, at 21. Thus, contrary to Professor Richard Epstein's assertion that the AALS imposed a requirement of diversity on its member schools, *see* Richard A. Epstein, *Affirmative Action For The Next Millennium*, 43 LOY. L. REV. 503, 520 (1998), the policy favoring diversity in legal education began in the law schools and was adopted as AALS policy by a vote of the representatives of all member law schools. *See* AALS 1999 HANDBOOK, *supra* note 24. To be sure, as Epstein charges, once AALS Bylaw 6-4 (c) was adopted, "[d]iversity ceases to be an option and has become a command." Epstein, *supra*. But Epstein, as a self-proclaimed libertarian, surely realizes that a law school's membership in the AALS is voluntary.

26. *See* Lino A. Graglia, *Special Admission of the "Culturally Deprived" to Law School*, 119 U. PA. L. REV. 351 (1970); *cf.* Derrick A. Bell, Jr., *In Defense of Minority Admissions Programs: A Response to Professor Graglia*, 119 U. PA. L. REV. 364 (1970).

27. *See* Dellinger, *supra* note 15, at C1.

28. *See* Sandalow, *supra* note 17, at 1874.

29. Stephan Thernstrom, *Diversity and Meritocracy in Legal Education: A Critical Evaluation of Linda F. Wightman's "The Threat to Diversity in Legal Education,"* 15 CONST. COMMENT. 11, 20 (1998).

30. *See id.* Professor Thernstrom recounts my appearance with the following:

> Dean Herma Hill Kay of Boalt Hall was asked on the McNeil-Lehrer Newshour in April 1995 why there was a "widespread perception that the minorities who are admitted with those special considerations are the result of standards being lowered?" Dean Kay answered, "Well, I don't think that it applies to the universe that I know best, which is the law school." There was no lowering of standards, she maintained. "When you have to choose between two equally qualified persons," it was appropriate to pick the "person of color" in order to "do something about the really fundamental problem of racial

separate questions, quoted below,[31] the first dealing with admissions, and the second—in which the quoted phrase appears—dealing with the very different matter of hiring. In hiring decisions, individuals are often compared to each other, for only one will get the job, and the differences between them may be quite small. In the admissions context, however, each applicant is measured

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prejudice in this society."

> Such references to "equally qualified" candidates conveyed the impression that the minority students who were being admitted to the most prestigious and selective law schools as a result of affirmative action had exceptional academic records, but could only boast of 3.75 rather than 3.78 grade averages, perhaps, and LSAT scores in the 94th rather than the 96th percentile.

Id. *See also* Stephan Thernstrom, *The Scandal of the Law Schools*, COMMENT., Dec. 1, 1997, at 27 (beginning the article with a reference to this same quoted phrase, and connecting it to admissions policies).

31. *See* Transcript of McNeil-Lehrer Newshour, Series -Affirmative Action 9, 10-11 (Apr. 24, 1995) (on file with author).

> Ms. Hunter-Gault: Well, why is it that there seems to be a widespread perception that the minorities who are admitted with those special considerations are the result of standards being lowered?
>
> Dean Herma Hill Kay: Well, I don't think it applies to the universe that I know best, which is to law schools. We have a very low academic disqualification rate here, and it stands to reason if you're so selective, applying [enrolling] only 270 out of over 5,000, you really have a choice, a wide choice, and we don't admit anyone that we think will not be academically successful. Now there has, of course, been grade inflation over the past several years, and white students who were admitted here 10 years ago probably wouldn't be admitted in the competition of this class today.
>
> Ms. Hunter-Gault: Well, do you understand at all the argument of the so-called angry white male? I mean, do you have any sympathy for that?
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> Dean Herma Hill Kay: I do have sympathy for it. I think that people feel that they are not themselves prejudiced, that they are being asked to pay for a social obligation that the burden of this falls on them. When the voluntary affirmative action programs were begun, the economy was expanding, and it seemed possible to make way for all persons. The Supreme Court in its opinion in the *Weber* [sic] case [United Steelworkers of America v. Weber, 443 U.S. 193 (1979)] pointed out that minority hires were not displacing majority hires, and as we're getting into the shrinking economy, that's no longer possible. And when you have to choose between two equally qualified persons and it's always the white person who gets de-selected, obviously, people to whom that happens feel that it's unfair. And yet, if you are going to continue to try and do something about the really fundamental problem of racial prejudice in this society, there's no turning back, at least until we've made further advances.

Id.

against the entire pool, and the range of qualifications is much broader. Following Thernstrom's inaccurate portrayal of my statement, another commentator cited it as an example of a "disingenuous" description by an academic administrator regarding "the extent of the preference accorded minorities under race-sensitive admission policies, suggesting that race serves only as a tie-breaker or, at most, to overcome small differences among candidates."[32] This description, too, is inaccurate. As shown below, I stated quite clearly in my testimony to the University of California (UC) Board of Regents in May 1995 that one result of ending affirmative action in law school admissions would be a dramatic decline in the number of minority students in the entering class of my school.[33]

I. THE ATTACK ON AFFIRMATIVE ACTION IN THE MID-1990S

Little did I know when, as a law student at Chicago, I read the words of Chief Justice Warren in the *Brown* case, that one day I would be given the opportunity to serve as Dean of his law school, UC-Berkeley (Boalt Hall), and to do so at the very moment when its program of educational diversity was dismantled. For nearly twenty years, Justice Powell's opinion in *Regents of the University of California v. Bakke*,[34] had been the constitutional basis for achieving educational diversity in higher education. Responding to a reverse discrimination challenge by an unsuccessful white male applicant to the UC-Davis Medical School, Justice Powell used a strict scrutiny standard to test the school's special admissions program, which set aside sixteen out of 100 seats for minority students.[35] Powell found the program defective under that standard and suggested that a race-conscious program designed to produce educational diversity such as the one in use at Harvard College, would meet the strict scrutiny standard.[36] Thus, the Boalt Hall faculty restructured its special admissions program in light of Justice Powell's opinion to conform to its guidelines for achieving educational diversity consistent with constitutional standards and set a target range of twenty-three percent to twenty-seven percent of the entering class for whom race and ethnicity would count as factors in the admission process.[37] After I became Dean, the faculty once again examined the basis for its affirmative action policies with the help of a Task Force on Admissions Policy chaired by Professor Rachel Moran and comprised of faculty, students, and alumni.[38] The Task Force recommended,

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32. Sandalow, *supra* note 17, at 1902 & n.67.

33. *See* Herma Hill Kay, Presentation to the Board of Regents on Law School Admission (May 18, 1995) (on file with author).

34. 438 U.S. 265 (1978).

35. *See id.* at 290-91.

36. *See id.* at 316-18.

37. *See* Feature, *supra* note 20, at 22.

38. The Task Force was appointed as part of a conciliation agreement entered into between Boalt Hall and the Office for Civil Rights of the U.S. Department of Education on September 25, 1992, resulting from a compliance review that began in 1989.

and the faculty adopted on May 6, 1993, a pedagogical theory of critical mass as the core element of a diverse educational experience.[39]

A. The UC Regents' Resolutions: SP-1 and SP-2

Boalt's 1993 admissions policy was in effect when the Board of Regents of UC began its re-examination of the University's affirmative action policies in 1994. The Board acted in response to the complaints of a family whose son had been denied admission to the UC-San Diego Medical School.[40] During 1994-95, the Board heard testimony concerning the admissions practices of the colleges as well as graduate and professional programs of the University. I was asked to present testimony before the Board at its May 1995 meeting concerning the admissions policies of the three UC campus-based Law Schools: Boalt, UCLA, and Davis. Accordingly, I described Boalt's revised policies and procedures, and pointed out that these practices had first been applied to the entering class of

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39. *See Faculty Policy Governing Admission to Boalt Hall*, REPORT OF THE ADMISSIONS POLICY TASK FORCE 1993 (Boalt Hall, Berkeley, Cal.), Aug. 31, 1993, at 3, 6-7 [hereinafter *Faculty Policy*].

> The Law School is proud of its past success in training academically excellent, diverse student bodies and seeks to build on this experience in achieving its present pedagogical objectives. Therefore, it is the policy of the School to admit a class with diverse characteristics, in a manner that takes into account past admissions experience, pedagogical considerations pertaining to the dynamics of critical mass, and annual fluctuations in qualified applicant pools. Given the dynamics of critical mass, the Law School sets as a goal the admission of an entering class that includes roughly 8-10% African Americans, 8-10% Chicanos/Latinos, 8-10% Asian-Americans/Pacific Islander Americans, has a significant presence of Native Americans, and continues, as in recent years, to have meaningful numbers of disabled and older students and a rough parity of men and women, as annual fluctuations in qualified applicant pools allow. The class as a whole should be diverse with respect to regional background, life experience, and academic training; and internally within racial and cultural background. To achieve these goals, diversity factors are to be given weight in admissions decisions if it appears that without such weight the desired diversity would not be achieved. Yet, no student can be isolated from competition for any place in the class and this policy does not prescribe fixed maximum or minimum numbers of applicants to be admitted from any particular group. Rather, the Admissions Director and the Admissions Committee should weigh numerical and non-numerical evidence of qualifications for each applicant against the combined qualifications of competing applicants. No applicant will be admitted unless he or she appears capable of completing the Law School's course of instruction without falling into serious academic difficulty.

Id.

40. *See* WARD CONNERLY, CREATING EQUAL: MY FIGHT AGAINST RACE PREFERENCES 117-26 (2000) (describing his meeting with Mr. and Mrs. Cook and the November 1994 meeting of the Board of Regents where their charges were first discussed); John E. Morris, *Boalt Hall's Affirmative Action Dilemma*, AM. LAW., Nov. 1997, at 4, 5.

1994.[41] In that year, Boalt had an applicant pool of 5249 candidates, of whom fewer than one in six were admitted, and a class of 269 students was enrolled. Women constituted forty-eight percent of the class, while fifty-two percent were men. The class included twelve percent African-Americans, thirteen percent Hispanic/Latinos, fourteen percent Asians, one percent Native Americans, and sixty percent Caucasians and others (including those who declined to state such information). I pointed out that if we were to admit students only by reference to their index numbers (a combination of UGPA and LSAT scores)—which we at Boalt had never done for any of our students—the number of non-Asian minority students would have dropped in the 1994 entering class from sixty-six to nine, and the total percent of minority students (including Asians) would have been reduced from forty percent to fourteen percent. It is obvious that these numbers would be insufficient to create a critical mass of minority students who could help sustain the robust exchange of ideas necessary for a diverse education in law. I urged the Regents to allow the Law School's admission policy to be continued.

On July 20, 1995, the Regents adopted two Resolutions: SP-1, dealing with admissions, and SP-2, dealing with employment and contracting. The critical language of SP-1 is found in Section 2, which provides that: "Effective January 1, 1997, the University of California shall not use race, religion, sex, color, ethnicity, or national origin as criteria for admission to the University or to any program of study."[42]

In response to this Resolution, the Boalt faculty removed the target goals established in its 1993 Statement on Admissions Policy,[43] and adopted a new Statement of Policy on April 22, 1996 which, as amended in December 1997, currently reads in part as follows:

> In making admission decisions, the School gives substantial weight [changed from "greatest weight"] to numerical indicators (*i.e.*, undergraduate grade point averages and Law School Admission Test scores). Yet numbers alone are not dispositive. The Law School considers other factors as well for all applicants. For example, substantial consideration is given to letters of recommendation, graduate training, special academic distinctions or honors, difficulty of the academic program successfully completed, work experience, and significant achievement in non-academic activities or public service. If it appears that an applicant has experienced disadvantages, this will be considered in . . . assessing the applicant's potential to distinguish himself or herself in the study and practice of law and to contribute to the educational process and the profession.[44]

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41. *See* Kay, *supra* note 33.

42. University of California Regents Resolutions SP-1 and SP-2 (July 20, 1995). *See* CONNERLY, *supra* note 40, at 147-58 (describing the Regents meeting of July 20, 1995).

43. *See Faculty Policy*, *supra* note 39.

44. *Faculty Statement on Admissions Policy*, BOALT HALL CATALOGUE & APPLICATION

We also expanded the personal statement our applicants are asked to submit from two pages to four pages and invited them to "separately discuss how [their] interests, backgrounds, life experiences and perspectives would contribute to the diversity of the entering class."[45] This admissions policy and its accompanying revised procedures were used to admit the entering class of 1997, the first that was admitted to Boalt Hall under the Regents' resolution of 1995.

Anyone who read a newspaper or watched TV during the late summer and early fall of 1997 was aware that the impact of SP-1 on the entering class of 1997 was even more drastic than I had predicted in my 1995 testimony to the Regents. We enrolled an entering class of 268 students that contained only one African-American (a student who was admitted in 1996, but deferred enrollment until this year), no Native Americans, fourteen Chicano/Latino students, and thirty-eight Asians, for a total of twenty percent people of color—down from thirty-three percent in 1996. Even these numbers, however, mask the full impact of SP-1 on the entering class of 1997. If we exclude all of the twenty-five students who had been admitted in prior years but who deferred their enrollment until 1997, and look only at applicants admitted for the first time in 1997 who chose to accept our offer, our class had exactly seven non-Asian minority students: three Chicanos and four Latinos. (I had predicted nine.) Our admit/offer numbers were much higher—we admitted fifteen African-Americans, twenty-four Chicanos, fourteen Latinos, two Native Americans, and 113 Asians—but our yield was extremely disappointing. Nor was that outcome very surprising. The competition for these students is fierce. We know, for example, that of the fifteen African-Americans, four went to Harvard, two each went to Yale and Stanford, and one each went to Columbia, Duke, and UCLA, while one chose Business School over Law School.[46] The three UC campus-based law schools' responses to SP-1 are discussed in Part II.[47]

B. The Center for Individual Rights Leads the Attack on Affirmative Action in the Courts

1. The Hopwood *Litigation in Texas.*—On September 29, 1992, four days after Boalt Hall signed its conciliation agreement with the Department of Education, a white woman named Cheryl Hopwood and three white men filed a reverse discrimination suit challenging their denial of admission to the University of Texas Law School on the ground that the Law School's policy of favoring Black and Mexican-American applicants violated the Equal Protection Clause

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1999-2000 (Boalt Hall, Berkeley, Cal.), 1999, at 74 (This statement was revised in December 1997 to delete the phrase "that adversely affected his or her past performance" following the word "disadvantages" and to add the concluding phrase "and to contribute to the educational process and the profession.").

45. *Personal Statement*, 1997-98 ADMISSIONS CATALOGUE (Boalt Hall, Berkeley, Cal.), 1997, at 56.

46. *See* Morris, *supra* note 40, at 7-8.

47. *See infra* Part II.

and Title VI of the Civil Rights Act.[48] The plaintiffs were represented by the Center for Individual Rights (CIR), a public interest advocacy organization headquartered in Washington, D.C.[49] *Hopwood* was the first of three lawsuits filed by CIR against public universities in Texas, Washington, and Michigan.[50] The legal and public relations strategy in all three cases was strikingly similar. The named plaintiff was a white woman; her co-plaintiffs were white men. All had been denied admission to the law school named as defendant. Typically, plaintiffs seek declaratory and injunctive relief, admission to the law school, damages and attorneys' fees. They are prepared for lengthy litigation.[51]

In *Hopwood*, Federal District Court Judge Sam Sparks rejected plaintiffs' constitutional argument, on the ground that it was too simplistic:

> The plaintiffs have contended that any preferential treatment to a group based on race violates the Fourteenth Amendment and, therefore, is unconstitutional. However, such a simplistic application of the Fourteenth Amendment would ignore the long history of pervasive racial discrimination in our society that the Fourteenth Amendment was adopted to remedy and the complexities of achieving the societal goal of overcoming the past effects of that discrimination.[52]

As it turned out, however, plaintiffs' argument was not too "simplistic" to be accepted by a three-judge panel of the Fifth Circuit, which reversed the judgment and filed an opinion, authored by Judge Jerry Smith and joined by Judge Harold DeMoss, questioning the continued viability of the Supreme Court's decision in *Bakke*.[53] Judge Jacques Weiner, Jr., in his dissent, argued that the majority had exceeded its authority.[54] The United States Supreme Court denied certiorari, with Justices Ruth Bader Ginsburg and David Souter pointing out the central importance of the issue, but noting that since Texas did not defend the

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48. Hopwood v. Texas, 861 F. Supp. 551 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), *on remand*, 999 F. Supp. 872 (1998).

49. *See* Ethan Bronner, *Conservatives Open Drive Against Affirmative Action*, N.Y. TIMES, Jan. 26, 1999, at A10 (discussing CIR's campaign to encourage college students to challenge the race-conscious admission practices of their schools); *see also* Jennifer L. Hochschild, *The Strange Career of Affirmative Action*, 59 OHIO. ST. L.J. 997, 1028-29 (1998) (describing the litigators of CIR and a similar organization, the Institute for Justice, as "a small group of ideologically driven, energetic young men (mostly) in nonprofit law firms funded by foundations, out to change the United States for the better by requiring its institutions to live up to the Constitution as they understand it"); *Beachhead for Conservatism*, NAT'L L.J., Dec. 27, 1999, at A11 (profiling the co-founders of CIR, Michael Greve and Michael McDonald).

50. *See* Hochschild, *supra* note 49, at 1028.

51. *See Beachhead for Conservatism*, *supra* note 49, at A11.

52. *Hopwood*, 861 F. Supp. at 553.

53. *See* Hopwood v. Texas, 78 F.3d 932, 944-45 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), *on remand*, 999 F. Supp. 872 (1998).

54. *See id.* at 963 (Weiner, J., concurring) ("[I]f *Bakke* is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement.").

admissions policy used to deny admission to the plaintiffs, the case was not ripe for review.[55]

Texas Attorney General Dan Morales ruled that the *Hopwood* injunction applied to financial aid as well as admissions.[56] Thus the law school at the University of Texas, like those at UC, was forced to admit its entering class in 1997 without the use of affirmative action. The impact of *Hopwood* on the racial and ethnic composition of that class was very similar to the impact of SP-1 at Berkeley: of 468 enrolled students, only four were African-American and twenty-six were Mexican-Americans.[57]

Dean Barbara Aldave of St. Mary's Law School courageously spoke out to declare that *Hopwood* had not overruled *Bakke*, and to promise that

> [u]nless and until my superiors order me to stop, we at St. Mary's University School of Law are going to ignore the *Hopwood* decision and adhere to the guidelines of *Bakke*. . . . At least as long as I am the dean, St. Mary's University School of Law will continue to turn out highly qualified lawyers, judges, legislators and public servants, and they will continue to come from all of the diverse racial and ethnic groups that make up our society.[58]

Not all private schools in Texas were willing to follow Dean Aldave's lead. As she noted, despite the fact that the Fourteenth Amendment applies only to public institutions, both Rice and Baylor suspended their admissions programs in the wake of *Hopwood*.[59]

Hopwood, on remand, went to trial again in March and early April 1997.

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55. *See* Texas v. Hopwood, 518 U.S. 1033, 1034 (1996) ("[W]e must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition.").

56. *See* Op. Tex. Att'y Gen. No. 97-001 at 18 (Feb. 5, 1997). "Although, as always, individual conclusions regarding specific programs are dependent upon their particular facts, *Hopwood*'s restrictions would generally apply to all internal institutional policies, including admissions, financial aid, scholarships, fellowships, recruitment and retention, among others." *Id.* Attorney General John Cornyn withdrew Letter Opinion No. 97-001 insofar as it affected "matters other than admissions" on September 3, 1999. Op. Tex. Att'y Gen. No. JC-0107 at 1 (Sept. 3, 1999). In doing so, however, he cautioned "state universities in Texas to await a resolution of *Hopwood* in the United States Court of Appeals for the Fifth Circuit or the United States Supreme Court before restructuring or adopting new procedures for their financial aid programs." *Id.*

57. *See* Memorandum from Shelli Soto, Assistant Dean for Admissions to Dean M. Michael Sharlot re 1995-1999 Statistics (Feb. 2, 2000) (on file with author). The last admissions cycle that was completely free of *Hopwood* was the entering class of 1995. In that year, of 512 enrolled students, thirty-eight were African-American and sixty-four were Mexican-American.

58. Barbara Bader Aldave, Hopwood v. Texas: *Much Ado About Nothing? The 5th Circuit's Famous Opinions Should Not Be the Death Knell for Race-Based Admissions Programs*, TEX. LAW., Nov. 11, 1996, at 43. In 1998, the President of St. Mary's University declined to renew Professor Aldave's appointment as Dean. *See* SAN ANTONIO EXPRESS-NEWS, Oct. 25, 1997, at 1B.

59. *See* Aldave, *supra* note 58, at 43.

Judge Sparks found that the four plaintiffs would not have been admitted at Texas even "under a constitutional admissions system."[60] The school's petition for hearing en banc was denied by the Fifth Circuit on January 31, 2000.[61]

2. The Smith *Litigation in Washington.*—On March 5, 1997, the University of Washington Law School was named defendant in the second of three reverse discrimination suits filed by CIR.[62] As in *Hopwood*, the named plaintiff, Katuria Smith, was a white woman who had been denied admission to the law school.[63] Fifteen months after the suit was filed, Tyson Marsh and twelve other current and prospective students at Washington moved to intervene to defend the law school's affirmative action program.[64] Their motion was denied as untimely by District Court Judge Thomas S. Zilly, and his judgment was affirmed on appeal.[65] On November 3, 1998, however, litigation on the merits in *Smith v. University of Washington Law School* was cut short by the passage of Initiative 200.[66] An appeal is pending on the matter of damages and the admission to Washington of the certified class representative, Michael Pyle.[67]

3. The Grutter *Legislation in Michigan.*—In Fall 1997, the CIR set its sights on the University of Michigan. It filed a reverse discrimination lawsuit on December 3, 1997 against the Michigan School of Law.[68] As in *Hopwood* and *Smith*, the named plaintiff was a white woman, Barbara Grutter, who had been denied admission to the law school.[69] Her complaint alleged, among other things, that the law school "did not merely use race as a 'plus' factor or as one of many factors to attain a diverse student body. Rather, race was one of the predominant factors (along with scores on the Law School Admissions Test and undergraduate grade point averages) used for determining admission."[70] In response, the law

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60. Hopwood v. Texas, 999 F. Supp. 872, 879 (W.D. Tex. 1998).

61. *See* E-mail from M. Michael Sharlot, Dean, to Herma Hill Kay, Dean, University of California-Berkeley, Boalt Hall School of Law (Feb. 1, 2000) (on file with author). Dean Sharlot added that the case will be heard by a Fifth Circuit panel on the issues of damages and attorney fees for the plaintiffs and that the school intends "to seek rehearing en banc of the panel decision, and, if unsuccessful on the basic issue of the constitutionality of affirmative action, a la *Bakke*, for legal education." *Id. See* Janet Elliott, Hopwood *Won't Be Heard En Banc*, TEX. LAW., Feb. 7, 2000, at 1.

62. *See* Smith v. Univ. of Wash. Law School, 2 F. Supp. 2d 1324 (W.D. Wash. 1998).

63. *See id.* at 1328.

64. *See* Smith v. Marsh, 194 F.3d 1045, 1047 (9th Cir. 1999).

65. *See id.* at 1053.

66. *See infra* text accompanying notes 89-91.

67. *See Smith*, 194 F.3d at 1049 n.3.

68. *See* Grutter v. Bollinger, 16 F. Supp. 2d 797 (E.D. Mich. 1998). Earlier, CIR had filed a similar suit against the Michigan undergraduate admissions program. *See* Gratz v. Bollinger, 183 F.R.D. 209 (E.D. Mich. 1998).

69. *See Grutter*, 16 F. Supp. 2d at 799.

70. Plaintiff's Complaint, Grutter v. Bollinger, 16 F. Supp. 2d (E.D. Mich. 1998) (No. 97-75928), *available at* University of Michigan Law School Web Site, http://www.umich.edu/~urel/admissions/legal/grutter/grutter.html (Dec. 3, 1997).

school denied that its admissions policies led to the plaintiff being treated unequally, and stated its "current intention to continue using race as a factor in admissions, as part of a broad array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[71]

As in *Hopwood* and *Smith*, affirmative action proponents moved to intervene in *Grutter* as parties to the litigation.[72] District Court Judge Bernard A. Friedman denied the motion on July 6, 1998 on the ground that the proponents had failed to show that the defendant would not adequately defend their interests.[73] Similar motions had been denied in *Hopwood*[74] and *Smith*.[75] On appeal, however, the Sixth Circuit in *Grutter* reversed, with Judge Martha Craig Daughtrey basing her reasoning in part on the lessons learned elsewhere:

> There is little room for doubt that access to the University for African-American and Latino/a students will be impaired to some extent and that a substantial decline in the enrollment of these students may well result if the University is precluded from considering race as a factor in admissions. Recent experiences in California and Texas suggest such an outcome. The probability of similar effects in Michigan is more than sufficient to meet the minimal requirements of the impairment element.[76]

Following this ruling, the trial date in *Grutter* was postponed and recently set for January 15, 2001.[77] Meanwhile, Dean Jeffrey S. Lehman has made clear his belief that the law school's admission policy satisfies the *Bakke* standard.[78]

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71. Defendant's Answer, Grutter v. Bollinger, 16 F. Supp. 2d (E.D. Mich. 1998) (No. 97-75928), *available at* University of Michigan Law School Web Site, http://www.umich.edu/~urel/admissions/legal/grutter/answer2.html (Dec. 3, 1997).

72. The group seeking intervention in *Hopwood* was the Thurgood Marshall Legal Society, a student organization at Texas. In *Smith*, they were current and prospective Washington students. *See Smith*, 194 F.3d at 1047. In *Grutter*, the intervenors were seventeen African-American and Latino/a individuals who had applied or stated their intention to apply for admission at Michigan, and a group calling itself Citizens for Affirmative Action's Preservation (CAAP). *See* Grutter v. Bollinger, 188 F.3d 394, 397 (6th Cir. 1999).

73. *See Grutter*, 188 F.3d at 397.

74. Hopwood v. Texas, No. A-92-CA-563-SS, 1994 WL 242362, at *1 (W.D. Tex. Jan. 20, 1994), *aff'd*, 21 F.3d 603 (5th Cir. 1994), *cert. denied sub nom.*, Thurgood Marshall Legal Soc'y v. Hopwood, 518 U.S. 1033 (1996).

75. Smith v. Marsh, 194 F.3d 1045, 1053 (9th Cir. 1999).

76. *Grutter*, 188 F.3d at 400.

77. *See* Briefs, *Trial of Admissions Suit Delayed Until January 2001*, L. QUADRANGLE NOTES, Summer 2000, at 5; *Law School Admissions Suit Trial Delayed*, UNIV. RECORD, *at* University of Michigan Web Site, http://www.umich.edu/~urecord/9900/Apr10_00/12.htm (Apr. 20, 2000).

78. *See* Jeffrey S. Lehman, *A Statement from the Dean*, L. QUADRANGLE NOTES, Summer 1999, at 51, 52.

C. The Voters Speak: Proposition 209 in California and Initiative 200 in Washington

1. Proposition 209.—In 1994, Glynn Custred, then a California State University-Hayward professor, and Tom Wood, a white man claiming to have been denied a teaching job in favor of a less-qualified minority woman, undertook the task of putting an anti-affirmative action measure on the ballot in California.[79] The measure they co-authored, entitled "The California Civil Rights Initiative" (CCRI), qualified for the ballot during the Fall 1996 election.[80] The campaign to pass CCRI, which had been languishing, took on an increased vigor when UC Regent Ward Connerly, who along with Governor Pete Wilson had been the driving force behind SP-1 and SP-2, decided to lead the effort.[81] On November 5, 1996, California voters approved the measure as an amendment to the state constitution by a margin of 4,736,180 (fifty-four percent) to 3,986,196 (forty-six percent).[82]

The operative language of CCRI reads as follows: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[83] As applied to the three campus-based UC law schools, Proposition 209 went beyond the Regents' Resolution SP-1 in only two respects: (1) financial aid and (2) outreach and recruitment programs. By its terms, CCRI was effective immediately. On

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79. *See* Edward W. Lempinen & Pamela Burdman, *Measure to Cut Back Affirmative Action Wins*, S.F. CHRON., Nov. 6, 1996, at A1; *see also* CONNERLY, *supra* note 40, at 161 (noting that Wood "had never landed a full-time university appointment despite receiving a Ph.D. in Philosophy from U.C. Berkeley in the mid-seventies").

80. *See* Lempinen & Burdman, *supra* note 79, at A1.

81. *See* CONNERLY, *supra* note 40, at 165-67 (explaining that he agreed to chair the effort to put CCRI on the ballot in order to preserve the victory against preferences represented by SP-1 and SP-2).

> If CCRI didn't even have enough support to get on the ballot, it might legitimately be concluded that the people of California had spoken—if only by their silence—on the issue of preferences and, in effect, repudiated what we had done. If they revisited and overturned the vote, the principles we had fought for would be defeated, and the old system of preferences would be reestablished as official university policy, more strongly entrenched than ever.

Id. at 165-66.

82. *See* Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1495 (N.D. Cal. 1996), *vacated*, 122 F.3d 692 (9th Cir.), *cert. denied*, 522 U.S. 963 (1997); *see also* Benjamin A. Doherty, Comment, *Creative Advocacy in Defense of Affirmative Action: A Comparative Institutional Analysis of Proposition 209*, 1999 WIS. L. REV. 91, 102-07 (describing the campaign for Proposition 209 and citing exit polls showing that sixty-one percent of males and sixty-three percent of whites favored Proposition 209).

83. CAL. CONST. of 1879, art. I, § 31(a) (1996).

November 27, 1996, however, U.S. District Court Chief Judge Thelton Henderson granted the motion of plaintiff Coalition for Economic Equity for a temporary restraining order barring Governor Wilson and Attorney General Lungren from enforcing Proposition 209.[84] Further, on December 23, 1996, Chief Judge Henderson granted a preliminary injunction enjoining defendants from enforcing and implementing Proposition 209 pending trial or final judgment.[85] On appeal, this judgment was reversed by a three-judge panel of the Ninth Circuit, which vacated the preliminary injunction.[86] The United States Supreme Court denied review,[87] and Proposition 209 became fully effective on August 28, 1997, ten days after the fall semester had begun at Boalt Hall.

2. Initiative 200 in Washington.—Washington's Initiative 200 contained the identical language as Proposition 209, but, unlike Proposition 209, it was a statutory enactment rather than a constitutional amendment. It qualified for the ballot during the 1998 election, and was approved by the voters on November 3, 1998 by a margin of 58.22 % to 41.78%.[88] Once again, UC Regent Ward Connerly was active in the campaign to win voter approval of Initiative 200.[89]

In February 1999, after Initiative 200 was approved, Judge Zilly granted the Washington Law School's motion in the pending *Smith* case to dismiss the injunctive and declaratory claims as moot, decertified the class, denied the cross-motions for summary judgment, and stayed trial pending further order.[90] Because Washington is within the jurisdiction of the Ninth Circuit, that court's decision upholding the constitutionality of Proposition 209 meant that a similar challenge to Initiative 200 would be to no avail.[91]

3. Is Florida Next?—Florida became the site of a third attempt to enact a state-wide ballot measure patterned after Proposition 209 and Initiative 200 and spearheaded by Regent Connerly.[92] The initiative, slated for the November 2000

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84. *See Wilson*, 946 F. Supp. at 1495.

85. *See id.* at 1520-21.

86. *See* Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 711 (9th Cir.), *cert. denied*, 522 U.S. 963 (1997).

87. *See* Coalition for Econ. Equity v. Wilson, 522 U.S. 963 (1997).

88. *See* State of Washington Office of the Secretary of State, 1998 Washington State General Election Results, *at* http://www.secstate.wa.gov/elections/gen98.htm (last modified Dec. 3, 1998) [hereinafter 1998 Washington State General Election Results]. For an analysis of Initiative 200, see also Robert H. Kelley, *The Washington Civil Rights Initiative: The Need for a Meaningful Dialogue*, 34 GONZ. L. REV. 81 (1998-99).

89. *See* CONNERLY, *supra* note 40, at 205, 219-31, 242-45 (describing his decision to remain active in the battle to end preferences as necessary to protect the victories achieved in California, "[o]nce you embark on a cause like the one we'd undertaken, you have to keep advancing, if only to protect the ground you've already won," and describing the campaign for Initiative 200).

90. *See* Smith v. Marsh, 194 F.3d 1045, 1047-48 (9th Cir. 1999) (describing proceedings in the district court).

91. The Ninth Circuit panel that heard *Smith*, included Judge Diarmuid O'Scannlain, who also sat on the panel that heard the challenge to Proposition 209.

92. *See* CONNERLY, *supra* note 40, at 247-49; Rick Bragg, *Fighting an Uphill Battle*, N.Y.

ballot, was held up by the Florida Supreme Court's review of whether it violated the "single subject" requirement.[93] In November 1999, Florida Governor Jeb Bush sought to preempt support for the initiative by issuing an Executive Order that created a program, called One Florida, which abolished affirmative action in public contracting and college admissions.[94] The admissions provisions of the One Florida program are modeled after the Texas 10 percent plan[95] and would guarantee admission to one of the ten state universities to all high school students who graduate in the top twenty percent of their class.[96]

II. A POST-AFFIRMATIVE ACTION ENVIRONMENT

A. The California Law Schools' Efforts to Maintain Diversity

To date, the University of Texas continues to defend its affirmative action admissions program, in the hope that the United States Supreme Court will reverse *Hopwood* and reaffirm or strengthen *Bakke*.[97] Moreover, Michigan is preparing to defend its admissions policies at trial in mid-January 2001.[98] In California, however, *Bakke* remains off limits to the public law schools because of the 1995 action taken by the UC Board of Regents in adopting SP-1.[99] In both

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TIMES, June 7, 1999, at A16.

93. *See* Peter T. Kilborn, *Jeb Bush Roils Florida on Affirmative Action*, N.Y. TIMES, Feb. 4, 2000, at A1, A23; *see also* Hochschild, *supra* note 49, at 1005-27 (presenting data to support her conclusion that California and Washington are "anamolies" and that there is "no reason to expect a wave of successful efforts to abolish affirmative action through the electoral system"). The Florida Supreme Court is reviewing the measure to determine whether it complies with the "single subject" requirement. *See* CONNERLY, *supra* note 40, at 260-61 (indicating that if the Florida CRI does not qualify for the ballot in 2000, he and his supporters will try again in 2002).

94. *See* Kilborn, *supra* note 93, at A23.

95. For an analysis of the Texas plan, see Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245 (1999); David Orentlicher, *Affirmative Action and Texas' Ten Percent Solution: Improving Diversity and Quality*, 74 NOTRE DAME L. REV. 181 (1998) (arguing that regardless of the effectiveness of these plans on maintaining a measure of diversity in the state colleges and universities of Texas, they will have no impact on law school enrollment).

96. *See* Rick Bragg, *Affirmative Action Ban Meets a Wall in Florida*, N.Y. TIMES, June 7, 1999. This part of the program is expected to take effect in March 2000, following approval by the University of Florida systemwide Board of Regents. *See* Rick Bragg, *Minority Enrollment Rises in Florida College System*, N.Y. TIMES, Aug. 30, 2000, at A18 (reporting that minority enrollment increased by twelve percent in the freshman class of 2000, the first class selected under the One Florida plan).

97. *See* E-mail from Dean M. Michael Sharlot, *supra* note 61.

98. *See* Briefs, *Law School Admissions Suit Trial Delayed*, *supra* note 77.

99. *See* University of California Regents Resolutions SP-1 and SP-2, *supra* note 42; CONNERLY, *supra* note 40. UC Regent William Bagley, a supporter of affirmative action in admissions, indicated in late January 2000 that he was preparing a proposal which would allow the

California and Washington, the electorate has prohibited all state agencies from using "preferential treatment . . . in public education" by enacting Proposition 209 and Initiative 200.[100] The crucial question for public law schools in these two states is what can be done to maintain some measure of diversity within the constraints imposed by state law.

The three UC campus-based law schools have responded differently to SP-1 in their 1997 admissions programs.[101] As indicated earlier, Berkeley eliminated its numerical goals for minority admissions, but otherwise adhered to its commitment to diversity by strengthening its discretionary admissions practices.[102] UCLA, on the other hand, created a new admissions program based on socioeconomic factors designed to produce diversity.[103] The policy at UC-

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Board of Regents to reverse SP-1. Acknowledging that such a reversal would have no impact on admission policies as long as Proposition 209 remains the law, Bagley nonetheless pointed to its symbolic value in assuring students and faculty that minorities are welcome at the University. *See also* Tanya Schevitz, *Preferences Ban Faces Battle From UC Regent*, S.F. CHRON., Jan. 29, 2000, at A3. Regent Ward Connerly dismissed the effort, saying "I doubt he'll get a second." Anne Benjaminson, *Regent Proposes Prop. 209 Reversal of 209 to Repair Reputation*, DAILY CALIFORNIAN, Feb. 1, 2000, at 1, 4. The *San Francisco Chronicle* supported Bagley's idea, noting that "[s]tudents and faculty who have a choice between a UC campus and another university that has made clear its commitment to diversity are often eliminating UC because of the regents' policy" and calling upon California Governor Gray Davis and other regents to "support Bagley in his effort to restore an atmosphere of welcome to ethnic minorities." Editorial, S.F. CHRON., Feb. 2, 2000, at A26.

100. *See* CAL. CONST. of 1879, art. I, § 31(a) (1996); 1998 Washington State General Election Results, *supra* note 88; Kelley, *supra* note 88; *see also supra* text accompanying notes 83 and 88.

101. The fourth public law school in California, UC's Hastings College of the Law, is governed by its own Board of Trustees, not by the Regents of UC, and was unaffected by SP-1. It was, however, subject to Proposition 209. Hastings has an admission program that is based on class rather than race and ethnicity, called the Legal Education Opportunity Program (LEOP), which does not rely on *Bakke*. Boalt Hall's 1997 Task Force on Admissions Policy examined the Hastings LEOP, which is used to admit twenty percent of the entering class, but decided that because of differences in the applicant pools and student bodies of the two schools, it would not be successful at Berkeley. *See* Rachel Moran et al., Report of an Ad Hoc Task Force on Diversity in Admissions, 51-54 (Oct.14, 1997) (unpublished report, on file with author). Nonetheless, the Boalt Hall faculty voted in 1997 to experiment with a pilot program that charged one faculty member to admit up to thirty applicants from a group of 150, selected from regular applicants who submitted a supplemental questionnaire that provided information about their socioeconomic status. Some 4000 questionnaires were mailed, of which 1300 were returned and entered into a computer program. The results of this experiment produced eighteen offers of admission, and yielded eleven enrolled students, who exhibited socioeconomic, but not racial or ethnic, diversity. *See Introduction*, 1998 ANNUAL ADMISSIONS REPORT (Boalt Hall, Berkeley, Cal.), 1998, at 2 (on file with author).

102. *See supra* text accompanying notes 42-44.

103. *See* Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472, 472-73 (1997).

Davis closely resembled that used by Berkeley.[104]

The entering law classes of 1997 showed dramatic declines in non-Asian minority enrollment in both California and Texas, but there were individual variations among the three UC campus-based law schools. Both UCLA and Davis successfully enrolled more African-American students in the class of 1997 than Berkeley, while the enrollment picture at Texas was closer to that of Berkeley than UCLA.[105]

In the wake of the 1997 admissions cycle, law schools in California re-examined their practices. At Berkeley, the faculty made the following changes, which were implemented in the 1998 admissions cycle:[106]

1. We discontinued the use of a formula used to weigh UGPAs from undergraduate institutions.[107] The Director of Admissions and the Admissions Committee reading teams now evaluate UGPAs based on data provided by the Law School Data Assembly Service (LSDAS) regarding grade inflation and the relative competitiveness of the student body at undergraduate institutions as well as the applicant's program of study.

2. We enlarged the pool of applicants considered by the Admissions Committee.[108] Each year we have around 4000-5000 applicants for the 270 places in our entering class. The Director of Admissions and his staff review all of these files, and the Director admits roughly 500 applicants, while the Admissions Committee admits the balance needed to offer admission to approximately 850 applicants. In 1998, the Committee read nearly 1400 files, up from 1200 in 1997. This increase gave the Committee a broader pool to consider.

3. In order to minimize over-reliance on the LSAT, we began reporting LSAT scores in bands to the Committee, a practice adopted by the Law School Admissions Service in reporting applicants' scores to us.[109]

4. In order to focus readers more closely on individual achievements, we stopped grouping applicants' files in ranges labeled "A," "B," "C," or "D"

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104. *See* Bruce Wolk, Presentation to the Regents' Committee on Educational Policy (June 18, 1998) (noting that Davis uses both numerical factors, including UGPA and LSAT scores combined into an index, as well as more subjective factors, such as "extra-curricular activities, community activities and employment experience, advanced degrees or studies, the applicant's personal statement, achievements for oneself or others, despite social, economic, or physical handicap, and unusual accomplishments, abilities, or skills that would be relevant to the study of law").

105. *See infra* Table 2.

106. *See* Feature, *Admissions Update: The Class of 2001*, BOALT HALL TRANSCRIPT, Fall 1998, at 30.

107. *See id.*

108. *See id.*

109. *See id.* Thus, a score of 159 would be reported as falling within a band of three points lower and three points higher than the mid-point, or 156-162. This way of reporting the score is intended to alert the reader that a one, two, or three point difference between students is not significant.

according to Index Scores.[110]

5. We paid special attention to applicants whose standardized test scores, such as the SAT, did not accurately predict their academic potential in college as measured by their UGPA.[111] If such an applicant also had a weak LSAT, but a strong UGPA, we treated the LSAT as a weaker predictor.

We did not expect any single one of these changes to produce a big difference in the make-up of the 1998 entering class. Taken together, however, we think they accomplished several positive results. First, they helped to dispel the negative and false public impression that Boalt Hall is hostile to minority candidates. The publicity surrounding the faculty discussion and adoption of each of these measures showed that we were trying in good faith to find race-neutral ways to maintain diversity.

Second, these measures gave the Director of Admissions wider discretion in admitting applicants than he had in prior years. As he put it in describing our practices to his fellow admissions professionals, these changes facilitated the school's search for the best applicants. In particular, he sought applicants who had both strong academic potential, as measured by their numerical predictors, and who had a potential "voice" to contribute to the classroom dialogue, as indicated by their background and experiences.[112]

Finally, these changes allowed the Admissions Committee to focus more closely than it had done in prior years on non-numerical factors as well as numerical indicators. All of the nearly 1400 files they read had been pre-screened by the Director of Admissions, and all were from applicants fully qualified to study law at Boalt Hall. These files were distributed among six reading teams so that each team read approximately 215 files. The individual choices made by the faculty members of these teams were based on the material in the files and their experience as Boalt Hall professors in judging the suitability of applicants. The faculty members of the Admissions Committee are appointed by the Dean and change over time. The procedure we use affords the faculty a significant measure of discretion, and their use of that discretion is the first step in selecting the superbly qualified, intellectually stimulating, creative, and

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110. *See id.* An index score at Berkeley is a number resulting from a formula that weights the LSAT and the UGPA equally. Not all schools use an index score in their admissions processes, and those that do use index scores vary the amount of weight given to the two variables that constitute the measure. Thus, the Law School Admission Council (LSAC) which administers the LSAT, reported that for the application year 1997-98, the 179 ABA-approved law schools used the following types of index formulas: 106 (fifty-nine percent) used a formula based on LSAC correlation study results; forty-six (twenty-six percent) used a different formula representing alternative weightings of LSAT and UGPA; and twenty-seven (fifteen percent) used no index formula produced by LSAC. *See* Herma Hill Kay, *Report of the Committee on Diversity in Legal Education*, SYLLABUS, Fall 1998, at 1, 15.

111. *See* Feature, *supra* note 106.

112. *See id.*; *see also* Herma Hill Kay, Testimony Before the Regents' Committee on Educational Policy (June 18, 1998) (quoting Boalt Hall Director of Admissions, Edward Tom) (on file with author).

resourceful students who typically attend our school.

Once the Admissions Committee and the Director of Admissions have admitted the applicants, the second step, that of recruitment, takes priority. Faculty, staff, and administrators made telephone calls and exchanged email correspondence with admitted applicants, urging them to accept our offers of admission. In addition, we received significant help from our alumni, who hosted receptions for our admitted students around the country as well as in the Berkeley-San Francisco Bay Area. Further, although Proposition 209 has limited our ability to use race-targeted scholarships and financial aid to recruit applicants, its terms do not apply to private organizations. Both the Bar Association of San Francisco and the Wiley Manuel Law Foundation were instrumental in raising funds for scholarships and in selecting students admitted to Bay Area law schools to receive the scholarships.[113] Finally, we made and distributed an eight-minute video entitled, "Welcome to Boalt Hall." The video featured Boalt students, faculty, alumni, and the dean. It described Boalt as an attractive and stimulating place to study law and was well received by our admits.[114]

As a result of the changes in faculty admission policy and the increased recruitment effort, Boalt's 1998 entering class showed a modest increase in diversity over the preceding year,[115] but the numbers were roughly half that attained in 1996 with the help of affirmative action.[116] In her testimony before the California Senate Select committee on Higher Education in Fall 1997, then Dean Susan Prager of UCLA identified the situation that produces such extreme competition among law schools for the minority students with the highest credentials. She said:

> Once affirmative action is no longer a tool, the problem is the small number of applicants who have the highest numerical credentials. The law school applicant pools are very large and the sheer number of white applicants dominates at every level of that pool. For the most competitive of schools, the upper reaches of the pool based on grades

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113. *See* Feature, *supra* note 106, at 31; *see also News from the Bar: United We Stand*, 24 SAN FRAN. ATT'Y 7 (BASF describes how it raised $350,000 to fund minority scholarships "as a concrete way to increase diversity at northern California law schools.").

114. The video was funded by a private gift of $10,000 from Sun Microsystems and a one-time recruitment allowance of $20,000 from the Office of the President of UC.

115. There were 269 students enrolled in the entering class of 1998, of whom eight (three percent) were African-American; twenty-three (nine percent) were Hispanic; two (one percent) were Native American; and forty-eight (eighteen percent) were Asian. *See Table IV: Diversity in the J.D. Program*, 1999 ANNUAL ADMISSIONS REPORT (Boalt Hall, Berkeley, Cal.), 1999 (on file with author) [hereinafter 1999 ANNUAL ADMISSIONS REPORT].

116. There were 263 students enrolled in the entering class of 1996, of whom twenty (eight percent) were African-American; twenty-eight (eleven percent) were Hispanic; four (two percent) were Native American; and thirty-eight (fourteen percent) were Asian. *See* 1996 ANNUAL ADMISSIONS REPORT (Boalt Hall, Berkeley, Cal.), 1996, at 2 (on file with author).

> and LSATs have minuscule numbers of African Americans and Latinos. For example, in the entire nation this year, there were only 103 African American and 224 Latino applicants who had LSATs of 160 or better and had grades of 3.25 or better. Of these, only 16 African Americans and 45 Latinos had LSAT's [sic] above 164 and grades of 3.5 or better. In contrast, there were 2,646 white applicants with these credentials, and 7,715 in the 160 LSAT and 3.25 and above category . . . .
>
> When we consider that 18 African Americans enrolled at Yale Law School alone this year, we can predict the demand for the remaining students in the higher qualification cohort. Looking at the above data also makes clear that most, if not all, of the highest quality private law schools are engaging in affirmative action. The recent policy changes in California make it impossible for us to remain competitive when it comes to the national pool of minority students.[117]

Given this data, Boalt Hall's situation is not difficult to grasp for three reasons. First, Boalt's applicant pool is national in scope, and the majority of our students come from the best research universities. In 1997 our applicant pool came from 458 undergraduate schools, our admits came from 148 of these schools, and the top five schools attended by those who enrolled were Berkeley, UCLA, Stanford, Harvard, and Yale. Second, Boalt is, and has been for many years, recognized as the most selective public law school in the country. Third, our entering class has very high academic indicators. In 1997 the mean UGPA was 3.7, and the mean LSAT was 167 (96th percentile). If we had admitted minority students whose academic indicators were well below those of the class as a whole, our good faith compliance with SP-1 would be open to challenge.

Even with the changes we instituted for the admission of the entering class of 1998, these factors changed very little. In 1998, our pool of 4587 applicants came from 500 undergraduate schools, our admits came from 196 of these schools, and, while their respective order had changed, the top five schools attended by the 269 students who enrolled still included Berkeley, UCLA, Stanford, Harvard, Yale (these latter two schools tied), and Cornell. The mean UGPA of the entering class of 1998 was 3.72 and the mean LSAT was 165 (93rd percentile).[118]

Boalt Hall did not make any further changes in its admissions policies during the 1999 admissions cycle. With the help of additional funding from the Berkeley campus and the State Legislature, however, we were able to expand our outreach efforts by a significant measure. We hired an Associate Director of Admissions for Outreach and Recruitment, who joined us in August 1998. With his help, we visited more schools and admission workshops during the fall of 1998 in order to encourage prospective students to apply to Boalt. In the winter and spring of 1999, our alumni continued their recruitment efforts with

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117. Susan Westerburg Prager, Testimony Before California Senate Committee on Higher Education (Sept. 22, 1997) (on file with author). *See also* Morris, *supra* note 40, at 5-6.

118. *See* 1999 ANNUAL ADMISSIONS REPORT, *supra* note 115, at Table IV.

receptions and dinners for the admits. The faculty, students, and administration continued their interaction with the admits, and the video was distributed once more.

In early September 1999, UC's three campus-based law schools released their admissions statistics for the entering class of 1999. Table 1 shows the results of three years without affirmative action in California.[119]

Currently, an interdisciplinary committee on New Definitions of Merit chaired by Professor Margarie McGuire Shultz is at work at Boalt, charged with formulating possible redefinitions of merit. It is investigating predictors of success in law school beyond first year grades and, more broadly, predictors of success in the legal profession.

B. The Report of the Diversity Committee of the Section of Legal Education and Admissions to the Bar

In 1996, Dean Rudy Hasl, as Chair of the Section of Legal Education and Admissions to the Bar, charged the Section's Committee on Diversity in Legal Education to consider two matters: (1) law school admission policies in the wake of the Fifth Circuit decision in *Hopwood*, the UC Regents' resolution, and Proposition 209; and (2) the treatment of women students, faculty, staff and administrators in legal education. Chair Beverly Tarpley reappointed the Diversity Committee in 1997 with the same charge. The Committee chose to concentrate during those two years on the first part of its charge, and filed a report that was accepted by the Council at its August 1998 meeting and distributed to all Deans.

With the help of President Philip D. Shelton of the Law School Admission Council (LSAC), the Committee undertook a pilot project to analyze how law schools use the LSAT in their admissions processes and recommended a range of available race-neutral options that schools might use to improve the accuracy of the LSAT and to maximize diversity. In conducting this study, LSAC provided the Committee with data from ten unidentified public law schools, including nine from California and the Fifth Circuit and one outside those areas. The report for each school included descriptive historical data for the applicant/admit pools for application years 1994-95, 1995-96, and 1996-97, and the same information for the number of actual admits in fall 1997 if the school had used as the criteria for admission the index number only, or the LSAT only, or the UGPA only.[120]

Three hypothetical models were constructed (called Alternatives A, B, and C). These models used baseline LSAT scores drawn from each school's actual admit pool for the 1995-96 admission year to identify "qualified" applicants. Alternative A used an LSAT score equal to the score that was actually tenth from the lowest score of all admitted applicants from that school. (The lowest score was not used to avoid outliers.) Alternative B expanded the LSAT range by five

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119. *See infra* Table 1.

120. *See* Kay, *supra* note 112, at 14-16.

points, and Alternative C expanded the range by an additional five points. In each instance, applicants who met the "qualifying" LSAT score were then ranked according to UGPA and a matrix that displayed the characteristics of the students admitted (a number equal to the number of actual admits in the class entering in the fall of 1997).

Each of the above methods for identifying admitted applicants was matched against the following characteristics: gender, ethnic identity, LSAT scores, undergraduate major, graduate degree earned, and resident/nonresident status. After reviewing this data, the Committee focused on an analysis that compared the proportion of admits to total applicants with the proportion of actual minority admits to qualified minority applicants. The purpose of this analysis was to determine whether using the LSAT as a qualifying credential might give schools an opportunity to expand minority admissions. We hypothesized that a school would expand its pool of qualified applicants by using the LSAT as a qualifying credential if the ratio of its actual minority admits to its qualified minority applicants was greater than the proportion of total admits to total applicants.

Given this hypothesis, the Committee expanded its analysis to include thirty-one law schools, public and private, from across the country and across the spectrum of schools, including the original ten. We found that if Alternative A had been used, six schools would have expanded the subset of qualified African-American applicants in their pool; fourteen would have expanded the subset of qualified Chicano/Mexican Americans; and seven each would have expanded the subset of qualified Hispanic/Latino and Asian/Pacific Islanders. The results which could have been obtained by using Alternative B were even larger: nineteen schools would have expanded the subset of qualified African-Americans; eighteen the subset of Chicago/Mexican Americans; twenty the subset of Hispanic/Latinos; and fourteen the subset of Asian/Pacific Islanders. It appears that nearly half the law schools might give themselves a better opportunity to broaden the subset of eligible applicants in their pool and to improve their minority admissions if they utilized Alternative B. The Committee recommended that interested schools should request the data underlying this analysis from the LSAC in order to determine the effect of either Alternative A or B on their own applicant pool.

CONCLUSION: THE SHAPE OF THE FUTURE

At this moment in American society, with race relations becoming more strained than ever before and the basis for trust and respect becoming ever more fragile,[121] it is the numbers that tell the story. Table 2 shows the numbers of

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121. *See* Stephen Reinhardt, *Remarks at UCLA Law School Forum on Affirmative Action: "Where Have You Gone, Jackie Robinson?,"* 43 U.C.L.A. L. REV. 1731, 1732 (1996).

> Some of what is happening today, partly as a result of the assault on affirmative action, is heartbreaking. The animosities among minority groups are increasing. There is disunity and disharmony among peoples of color. . . . Sadly, a lot of sincere, well-meaning folks also contribute to the growing separation, isolation, and division by

minority students admitted and enrolled at the three UC campus-based law schools and at the University of Texas School of Law in Austin for the five year admission cycles 1995-1999.[122]

According to ABA President William Paul, who has chosen diversity as his Presidential Initiative, the crucial number to focus on is the racial divide between the legal profession and the rest of the country. Speaking at the AALS House of Representatives in January 2000, President Paul said that he had discovered, while examining demographic trends in order to predict what the profession might look like in twenty or thirty years,

> that this country is 30 percent people of color today and it's moving toward 50 percent people of color. But our profession is still 92½ percent white. Now, I believe that the legal profession must reflect the society which it serves . . . . [I]t is essential to the preservation of our free society that the legal profession reflect the society. We are the connecting link between society and the rule of law, and I don't have much confidence in the ability of a profession that's 92½ percent white to remain and continue as the connecting link to a society moving toward 50 percent people of color.[123]

To political scientist Nathan Glazer, who once opposed affirmative action, the crucial statistic is the dramatic drop in African-American enrollment in leading colleges and universities resulting from the end of affirmative action, and the predictable societal consequences of that drop:

> I believe the main reasons we have to continue racial preferences for blacks are, first, because this country has a special obligation to blacks that has not been fully discharged, and second, because strict application of the principle of qualification would send a message of despair to many blacks, a message that the nation is indifferent to their difficulties and problems.[124]

Authors William G. Bowen and Derek Bok, on the other hand, are impressed by positive numbers.[125] Looking at the outcome of the use of affirmative action

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> joining with some not-so-well-motivated politicians in sponsoring initiatives, legislation, or lawsuits that tell the minority community just how far our relations have regressed, how little others value *their* welfare, *their* children, *their* very lives. What was once unthinkable is now upon us. We are regressing. Is this country really going to go backwards in a serious way—will we really continue to move toward the resegregation of our society?

Id. (emphasis added).

122. *See infra* Table 2.

123. Remarks of ABA President William Paul Before the AALS House of Representatives, Washington, D.C., in Proceedings of the AALS 2000 Annual Meeting, at 202-03 (Jan. 6, 2000) (on file with author).

124. Nathan Glazer, *In Defense of Preference*, NEW REPUBLIC, Apr. 6, 1998, at 18, 24.

125. *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM

admission policies in colleges and universities, which they were the first to document, Bowen and Bok have shown the crucial role those policies played in providing the means of access to leadership positions in American society by African-Americans.[126] While their study does not include law school admissions, I have no doubt that a similar study would produce similar results.[127]

Nonetheless, what I find most significant is the change in the numbers over time. In 1965, when affirmative action became official U.S. government policy, the legal profession in the United States consisted almost entirely of white men. Only three out of every 100 lawyers were women; less than one percent were African-American; and the number of other minority lawyers was so small that it was not even tallied in the reporting sources.[128] The Bureau of Labor Statistics reported in January 1999 that of 912,000 lawyers employed in the United States, 28.5% were women, four percent were African-American, and three percent were Hispanic.[129] Asians were not reported separately. Although Boalt Hall's special admission policies were not based on sex, the rising application rate of women to law school has been the major success story of the decades after 1960: between 1965 and 1985, the proportion of women J.D. students in ABA-approved schools went from four percent to forty percent of the total.[130] Today, women constitute fifty-eight percent of the student body at Boalt, and the entering class of 2000 was sixty-four percent female.[131]

These numbers say something vitally important about our concept of ourselves as a society. The ideal of American democracy—equal justice under law—ultimately must rest on public confidence that the system of justice is fair and even-handed in its treatment of all people regardless of their status or condition. Thus, it is essential that all of the people in our nation be able to sustain an abiding trust in the fairness of the rule of law. Otherwise, they may not be willing to obey the law. Yet today that trust has been severely tested. The

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CONSEQUENCES OF RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1999).

126. *See id.*

127. *See* Deborah Rhode, *Legal Education: Professional Interests and Public Values*, 34 IND. L. REV. 32 (2000) (discussing a 1999 survey of students at two leading law schools who reported positive effects of diversity on their educational experience).

128. *See* FRED B. WEIL, THE 1967 LAWYER STATISTICAL REPORT, NATIONAL: DISTRIBUTION OF WOMEN LAWYERS, 1948-1966 (Table 4) (reporting 2.8% women in 1966) (American Bar Foundation, 1968); "Report of the Advisory Committee for the Minority Groups Study," 1967 Annual Meeting, Proceedings, Part One, Section I, at 160 (reporting 1.3% Negro lawyers in the legal profession) (AALS, 1968).

129. U.S. Bureau of Labor Statistics, Employment and Earnings, Jan. 1999, Table 11, Employed Persons by Detailed Occupation, Sex, Race, and Hispanic Origin, at 178.

130. OFFICIAL ABA GUIDE TO APPROVED LAW SCHOOLS, LEGAL EDUCATION AND BAR ADMISSION STATISTICS, 1963-99, at 450 (2000 Edition) (reporting total J.D. enrollment for 1965-66 as 56,510 and total women J.D. enrollment as 2374 (4.25%); for 1985-86 as 118,700, and as 47,486 (40%)). The most current year reported is 1998-99, when total J.D. enrollment had risen to 125,627, of whom 57,952, or 46% were women. *See id.*

131. *See* 2000 ANNUAL ADMISSIONS REPORT (Boalt Hall, Berkeley, Cal.), 2000, at Table III.

poor, the underprivileged, and various other groups who remain outside the mainstream of our country do not have full confidence that the law treats all persons fairly and with respect. We can help allay this mistrust by making sure that the future lawyers, judges, and law teachers of this country are more representative than they now are of the nation as a whole. The need to diversify the legal profession is not a vague liberal ideal; it is an essential component of the administration of justice. The legal profession must not be the preserve of only one segment of our society. Instead, we must confront the reality that if we are to remain a government under law in a multicultural society, the concept of justice must be one that is shared by all our citizens.

As Justice Ruth Bader Ginsburg observed in her eloquent dissent in *Adarand Constructors, Inc. v. Pena*: "Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice."[132] As a child, I saw that bias at work, up close and first-hand. I have not forgotten the effect it had on the African-Americans in the rural South who were its intended targets. Nor have I forgotten the mission it awakened in me to do everything within my power to end the legally entrenched injustice on which it was based. Although we as a nation have made great strides in the past forty years since *Brown* was decided, we have not yet come close to achieving true racial equality. Yet without affirmative action, the number of enrolled minority students is likely to be pitifully small in the most prestigious public law schools. As Table 2 shows, aggressive outreach and recruitment efforts in 1998 and 1999 have raised Boalt Hall's yield well above the low point of 1997.[133] However, the number of African-Americans, for example, is still less than half of what it was in 1995 and 1996. Even greater efforts will be needed in future years, and we must accept that those efforts will be required every year for an indefinite period. We cannot afford to give up the struggle now.

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132. 515 U.S. 200, 274 (1995) (Ginsburg, J., dissenting) (citation omitted).

133. At the undergraduate level, the overall number of African-American, Hispanic, and Native American freshmen who will enter the University of California in Fall 2000 is expected to rise to 7336, slightly higher than the 7236 who enrolled in 1997, the last year of affirmative action for undergraduates. But the numbers continue to drop at the two elite UC campuses, Berkeley and UCLA, where fall enrollment of freshmen will be 1169 and 1449 respectively in 2000, compared to 1778 and 2010 in 1997. *See* Barbara Whitaker, *Minority Rolls Rebound at University of California, But Disparity Persists at Main Campuses*, N.Y. TIMES, Apr. 5, 2000, at A12. The Fall 2000 entering class at Boalt Hall has 270 students, of whom seventy-seven are people of color, but only twenty-six of these are non-Asians. *See* 2000 ANNUAL ADMISSIONS REPORT, *supra* note 131, at Table IV.

TABLE 1

		All People of Color	Non-Asian People of Color	Class size
1999	UCB	60	25	269
	UCLA*	88	22	237
	UCD	44	20	161
1998	UCB	81	33	269
	UCLA	76	27	277
	UCD	47	17	183
1997	UCB	62	15	268
	UCLA	132	50	381
	UD	38	14	172

* Does not include 52 1Ls whose ethnic/racial data was mistakenly not counted.

TABLE 2
Minority Law Students Admitted and Enrolled in California and Texas
Fall 1995 through Fall 1999

	Admitted				Enrolled			
Fall 1995	UCB	UCLA	UCD	UT	UCB	UCLA	UCD	UT
African-American	77	82	27	91	21	20	3	38
Hispanic; Mex-Am	79	87	76	92	36	29	21	64
Native American	9	10	9	n/a	5	3	3	n/a
Asian; Pacific Islander	113	180	125	71	36	62	26	28
Fall 1996								
African-American	77	104	27	65	20	19	4	31
Hispanic; Mex-Am	85	108	69	70	28	45	16	42
Native American	10	10	6	n/a	4	5	1	n/a
Asian; Pacific Islander	129	186	162	93	46	48	22	30
Fall 1997								
African-American	18	21	20	11	1	10	5	4
Hispanic; Mex-Am	46	74	50	40	14	39	6	26
Native American	2	5	7	n/a	0	1	3	n/a
Asian; Pacific Islander	149	200	128	108	47	82	24	39

TABLE 2 (cont'd)
Minority Law Students Admitted and Enrolled in California and Texas
Fall 1995 through Fall 1999

	Admitted				Enrolled			
Fall 1998	UCB	UCLA	UCD	UT	UCB	UCLA	UCD	UT
African-American	32	18	18	25	8	8	3	8
Hispanic; Mex-Am	60	47	52	63	23	16	12	30
Native American	4	7	7	n/a	2	3	2	n/a
Asian; Pacific Islander	143	167	185	93	48	49	30	29
Fall 1999								
African-American	29	19*	19	32	7	3*	6	7
Hispanic; Mex-Am	57	58*	62	60	16	18*	14	32
Native American	3	5*	6	n/a	2	1*	0	n/a
Asian; Pacific Islander	117	156*	137	72	35	66*	24	28

* Does not include 52 1Ls whose ethnic/racial data was mistakenly not counted.
Sources: UC Office of the President, 9/10/99 (http://www.ucop.edu/acadadv/datamgmt/lawdata); UT Office of the Law School Dean.

RESPONSE TO DEAN HERMA H. KAY'S AFFIRMATIVE ACTION PAPER

HENRY RAMSEY, JR.*

Let me follow Dean Herma Hill Kay's lead and also share some experiences from my early childhood. Like Dean Kay, I was born in South Carolina in 1934. At the age of three months, however, I was adopted and taken from Florence, South Carolina to Rocky Mount, North Carolina, where I lived until age seventeen and my enlistment in the U.S. Air Force. I find it interesting that twenty-six years later, Dean Kay and I both found ourselves entering the same law school in 1960, she as a beginning law teacher and I as a beginning law student. Later we would become colleagues on the Boalt faculty. Who could have predicted those outcomes in 1934 when we were both babies—one black and one white, one male and one female—in Jim Crow South Carolina?

I too attended segregated schools. All of Dean Kay's teachers and school administrators were white. All of mine were black. Incredibly, the city government had posted several of the homes in my childhood neighborhood with signs that read, "Condemned—Unfit for Human Habitation." These signs were old and weathered, with people still living in the houses. The streets in my childhood community were for the most part unpaved, the asphalt pavement ending at the precise point where white occupied houses stopped and black occupied houses began. The asphalt did continue for two blocks on two of the streets in my neighborhood—Washington Street and Arlington Street. These two streets led directly to maintenance shops of the Atlantic Coast Line Railroad Company and were used by workers, almost exclusively white, to commute to and from their jobs with the "Coast Line."

In North Carolina, and I assume it was the same in South Carolina, black elementary and secondary school students used the same books as their white counterparts. There was, however, one difference. We received their used books after the white students had received new books or a new edition. There was only one public library in my hometown and it was for whites only. Until I was about fifteen or sixteen, there had been only one public swimming pool, and that was for whites only. The only municipal jobs available for a black person, other than in a racially segregated black facility, was as a cook or cafeteria worker, or a janitor. Every effort was made by the white majority to demean black people and to undermine any confidence or sense of self-worth that a black person might try to develop. As a child and as a teenager, it was not unusual to observe mature, adult black men obsequiously referring to white teenagers and young adult men as sir, while the white teenagers and young adult men referred to them as "boy." All white females above infant age were referred to as "ma'am," as in "yes ma'am" and "no ma'am."

It was in this setting or social environment that I was first introduced to the concept of law. My earliest introduction to this concept was not of written or

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* Retired Judge, California Superior Court. A.B., University of California-Riverside; LL.B., 1963, University of California Berkeley; former Dean and Professor of Law, Howard University School of Law.

unwritten rules that regulate human conduct, determine property ownership, and guide human relationships. In the black communities of my hometown, "the law" was a police officer. A patrolman passing in a patrol car was not referred to as a police officer or patrolman, but as "the law." One did not hear, "I am going to call the police." Rather, it was I am going to call "the law."

Before me, no one from my neighborhood had ever attended law school. Actually, I was probably the first black person from my hometown to attend law school. During the time I lived in Rocky Mount, it was probably the case that most black adults in my community had never even attended high school. And yet, they had sufficient experience and insight to recognize that any legal dispute or conflict between a white police officer and a black person would not be about the law, but about the facts. They knew instinctively that in a legal forum where the outcome of the dispute was dependant on the credibility of witnesses, what was said by a white police officer[1] would be believed and any contradictory statement by a black person would be disbelieved. Therefore, in every meaningful sense of the word, the white police officer was "the law." It was essentially the same concerning any legal dispute between a "Negro" and a white person.

I was fortunate, however, in that the National Association for the Advancement of Colored People (NAACP) was an active force in my community. During my early teenage years, Ms. Vivian Patterson, a then young black woman, introduced me to the Youth Branch of the NAACP and enrolled me as a member. It was this involvement that exposed me to the legal notion of separate but equal. I have no recollection of being taught during this period that there was anything wrong with "separate but equal," other than it was not equal. We members of the NAACP youth branch were taught by Ms. Patterson that inequality in public facilities was illegal and that we did not have to accept it.

The evidence of inequality was all around us as noted by the following: the earlier mentioned school books that had previously been used by white students;[2] unpaved streets in several black neighborhoods; denial of access to municipal jobs; overt housing discrimination; overt and absolute job discrimination in the private sector; denial of access to the public swimming pool and library; separate waiting rooms at the railway and bus stations; balcony seats in the "colored" section of "white" theaters; segregated local busses as mandated by a North Carolina law that was prominently displayed on each bus; separate water fountains in the local department stores; segregated cars on trains and segregated sections on interstate busses; the department store policy that a black person could not try on a garment to check the fit; the quality of white-only downtown hotels and most white-only restaurants, when compared to hotels and restaurants available to black people.

Hopefully, the cruel circumstances that black Americans faced during the

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1. I keep saying white police officer but the adjective is really unnecessary. Until I was a teenager, there were no black police officers and, even then, that lone "Negro" police officer was restricted to the black community.

2. Their names were written in spaces provided on the inside book cover.

first seven or eight decades of this century is truly history, never to be seen or lived again in this country. Still, the continuing consequences of centuries of cruel racial discrimination and inequality must not and cannot be ignored. When measured against statistics for the white population and even the general population, these continuing consequences manifest themselves in diverse ways. Blacks, Hispanics, and Native Americans experience poorer health and substantially lower levels of health care, fewer high school and college graduates, a greater percentage of high school drop outs, an Internet gap, higher rates of unemployment, higher arrest rates, higher criminal convictions and incarceration rates, higher rates of teen-age pregnancy, higher levels of family poverty, lower home ownership rates, and lower levels of savings and investment in securities than white Americans. When measured by almost any economic or educational standard, Black Americans as a group, with the possible exception of Native Americans, when compared to statistics for white Americans, or Americans in general, continue to score either at or near the bottom. I have no doubt that these are continuing consequences of centuries of American racism, and, particularly, the horrific discrimination that occurred in the United States during the first six decades of the Twentieth Century.

In my judgment, education has been the most effective weapon in the fight to eradicate these terrible consequences of American racism. However, until recently, Black Americans were confronted by substantial barriers in their efforts to gain access to institutions of higher and professional education. While many of the formal barriers have for the most part been eliminated or substantially lowered, the continuing consequences of American racism remain as an effective barrier that is extremely difficult to overcome.

Affirmative action has been demonstrated to be one of the most effective means for overcoming barriers to higher education that are presented by the continuing consequences of racial discrimination. The statistical changes brought about in college and university enrollment of minority students through affirmative action admission programs can only be described as monumental.[3] The negative changes brought about in minority enrollment as a consequences of the elimination of affirmative action programs in California, Texas, and Washington have been extraordinary and devastating. I agree with the actions taken by the faculty at Boalt Hall, beginning with the 1998 admissions cycle, and the expanded outreach efforts at Berkeley as a promising model for increasing the number of minority students enrolled in our public law schools in the Fifth Circuit, California, and Washington. But, more must be done.

First, a strong defense of affirmative action programs must be maintained in the federal courts and in the state legislatures. It is still the case that none of the federal circuit courts, including the Fifth Circuit, has authority to reverse a decision of the U.S. Supreme Court. Four U.S. Supreme Court Justices concurred in Justice Powell's opinion in *Regents of the University of California*

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3. *See* Henry Ramsey, Jr., *Historical Introduction* to LINDA F. WIGHTMAN, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY, at iii, iv n.8 (1998).

v. Bakke.[4] Until five or more U.S. Supreme Court Justices reject the holding in that case, it continues to be the law of the land, *Hopwood v. Texas*[5] notwithstanding.[6] Every effort should be made by those who support and recognize the value of college and university affirmative action admission programs, to urge the courts to uphold those programs under the rationale announced by Justice Lewis Powell in *Bakke*.[7] The central principle of Justice Powell's opinion is that college administrators and faculty members have constitutionally permissible discretion and academic freedom to determine the importance and role of diversity at institutions of higher education. This is a fight well worth making, and I believe there is a significant chance of success. After all, there were those who "knew" that *Miranda*[8] would be reversed in the recently decided case of *Dickerson v. United States*.[9]

I also think one of the issues Justice Powell rejected in *Bakke* should again be asserted in support of affirmative action programs. The affirmative action program at issue in *Bakke* was being implemented at a school that obviously did not have a history of racial discrimination. The University of California (UC) at Davis Medical School was founded in 1968, well after racial discrimination at state supported educational institutions had been declared unconstitutional. Obviously, no credible claim of intentional racial discrimination could have been lodged against the UC Davis medical school. There, however, are many schools in the old Confederate states that did engage in intentional racial discrimination before *Brown v. Board of Education*,[10] and in many instances, even after *Brown*.

It, therefore, is my view that supporters of affirmative action should take the position that it is constitutionally permissible for colleges and universities *with a history of intentional racial discrimination* to implement affirmative action programs at such institutions as a means of halting and reversing the continuing effects of their past racial discrimination. This is much like the remedies afforded under *Croson*,[11] where it was held that, under certain circumstances, the U.S. Constitution permits states, cities, and other political subdivisions to use affirmative action to counter the continuing effects of past racial discrimination.

Beyond the theoretical grounds for such programs is the energy and commitment that supporters of affirmative action also need to bring to this effort. When *Brown*[12] was decided in 1954, it was seen as the end of school segregation. Professor Walter E. Dellinger, III, is quoted as having heard his teacher say:

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4. 438 U.S. 265 (1978).

5. 861 F. Supp. 551 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1998).

6. Hopwood v. Texas, 78 F.3d 932, 963 (5th Cir. 1996) ("[I]f *Bakke* is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement.").

7. *See Bakke*, 438 U.S. at 265.

8. Miranda v. Arizona, 384 U.S. 436 (1966).

9. 120 S. Ct. 2326 (2000).

10. 347 U.S. 483 (1954).

11. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

12. *See Brown*, 347 U.S. at 483.

"Children . . . the Supreme Court has ruled. Next year you will go to school with colored children."[13] But, those who believed in and supported racially segregated education mounted an opposition campaign in 1954 that quickly and legitimately earned the name, "massive resistence." I do not condone or advocate a repeat of the violence (University of Mississippi), lawlessness (Prince Edward County, Virginia), and mob action (Little Rock Central High School) that often characterized "massive resistence" to integration programs. I do, however, strongly urge those who recognize and support the critical need for diversity and affirmative action admission programs at our colleges and universities to bring the energy and commitment to their cause that the opponents of integration exhibited in their effort to maintain segregation. Those who lost, notwithstanding Governor George Wallace's desperate call for "segregation today . . . segregation tomorrow . . . segregation forever,"[14] lost their struggle because they were on the wrong side of the issue. But they did not lose for lack of will or effort. In this instance, those who support affirmative action programs are on the right side of the issue, and yet, we may lose the struggle solely because of a lack of will and effort.

The opponents of affirmative action have seized the high ground with their claim that illegal preferences are being afforded law school applicants of color at the expense of more qualified white applicants. The opponents of affirmative action, without explicitly saying it, have sold the American people on the idea that standardized test scores and undergraduate grade point averages are the only relevant measures of academic merit on whether one deserves admission to law school or another institution of higher education. According to their arguments, a student with a 3.4 UGPA and a 164 LSAT score is more qualified for admission to law school than a student with a 3.2 UGPA and a 162 LSAT score.

Does it matter what courses the applicant took in achieving a certain UGPA, or is it just the numbers? Does it matter what undergraduate school they attended? Does it matter when the grades were earned, or is it just the numbers? For example, is the student who earned 3.5 during the first two years of college and 2.5 during the last two, more qualified than the student who earned 2.5 during the first two years, but 3.5 during the last two? Is the student who worked a significant number of hours while attending college and earned a 3.0 less qualified than a student with a 3.2 who did not work at all? Again, is it just the numbers?

Our objective in establishing public institutions of higher learning cannot possibly be to afford professional careers only to those who do best on standardized tests. We must also want to contribute to the improvement of civil society and the development of humankind. To provide professional opportunities solely on the basis of standardized test scores and the UGPA is to

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13. Walter Dellinger, *A Southern White Recalls a Moral Revolution*, WASH. POST, May 15, 1994, at C1.

14. Alabama Dep't of Archives and History, Governor George C. Wallace, Inaugural Address of George C. Wallace (Jan. 14, 1963), *available at* http://www.archives.state.al.us/govs_list/inauguralspeech.html (last visited Oct. 3, 2000).

ignore the important objective of the meaningful participation by members of minority groups that is required to satisfy the notion of equal opportunity and develop an integrated America. It is also to deny the importance of diversity in the educational environment.

While they are important, clearly test scores are not a surrogate for academic merit. Few, if any, law school or university admission officers support the notion that the only relevant criteria for admission to law school or the university is numerical predictors. The facts are that admission professionals and faculty members consider and give significant weight to other factors in making the decision to extend an offer of admission to an applicant. They consider economic factors, life experiences, and a variety of other factors in the applicant's personal history in trying to select an entering class of meaningful texture and composition.

History and experience should have taught us that our goal must be inclusion, not exclusion, in all aspects of American society. Diversity—racial, ethnic, gender, economic, and geographical—are very relevant to the college and university admission decision. Therefore, in the academy, it is important that our admission criteria produce entering and graduating classes that reflect the various levels of diversity that participate in and contribute to the greatness of our nation.

Those of us who claim to support affirmative action programs at our colleges and universities, particularly in professional schools like law, engineering, and medicine, need to do more than just talk. We must develop theories, write articles, and otherwise work hard to support affirmative action programs where they still exist and to join the struggle to reinstate such programs where they have been eliminated.

Too many schools are abandoning affirmative action programs even before they have been sued. Simply hearing someone assert that affirmative action programs are unconstitutional, or that a conservative organization is considering filing an action, or that another school has been sued, is enough to cause some schools to abandon their affirmative action admission program. This principle and practice of "preemptive surrender" must be rejected in all of its forms. Students, faculty, and administrators in jurisdictions where affirmative action programs are being challenged as unconstitutional must insist that their schools follow the examples of the University of Michigan and the University of Georgia and fight back.

The final issue that I want to address is our need to recognize that affirmative action is an immediate and short-term solution. Our long-term and ultimate solution to the elimination of the continuing effects of past discrimination and ensuring diversity is to provide a quality public pre-school, kindergarten, elementary, and high school education. A reading of Jonathan Kozol's *Savage Inequalities*[15] will provide any rational and concerned person with all of the information needed to understand the problem and the solution. The primary problems are classes with horrendous student-teacher ratios, high school laboratories without equipment or supplies, schools without computers, schools

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15. JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991).

with ill-trained and untrained teachers, high schools with few or no advance placement classes, ill-trained and overloaded academic counselors, and physical facilities that are unclean, unattractive, and unsafe.

These are real barriers to adequate preparation for college, graduate, and professional schools, that can and must be eliminated if we are ever to afford a real opportunity for academic success, regardless of one's economic or social background, race, or ethnicity. We cannot afford to wait until our youth are in college before taking concrete action to provide them with the basic skills and analytical tools required for college, graduate, and professional study. It is our responsibility to convince our political leaders and fellow citizens that these goals are not only worthwhile, but that they are critical for our development as a nation and as a people. This is wisely stated in a bumper sticker I sometimes see, "If you think education is expensive, try ignorance."

Faculty members and students at our universities and colleges need to become more involved in local school issues and to advise and otherwise work with residents of low-income communities to help them improve the educational infrastructure and educational opportunities within those communities. There are various ways that members of the higher education community can be helpful in this effort. Examples include serving on local school boards, serving as advisors to advocacy organizations, and working with community organizations that focus on at-risk youth. The issue, however, is not so much how you choose to participate, but that you participate.

CONCLUSION

We have the human and economic resources to eradicate the effects of our history of bigotry and racial discrimination. We have the resources needed to close the gap between the rich and the poor concerning opportunities for a meaningful education, an adequate income, meaningful work, and the ability to make a meaningful contribution to our community and society. Affirmative action is one of the tools that has allowed us to make substantial progress in achieving our national goal of affording each American citizen a reasonable and fair opportunity to enjoy liberty and the pursuit of happiness. The message for us should be that it is not enough to say we are for it, we must also be willing to work and fight for it.

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NOTES

THE IMPACT OF THE *WASHINGTON LEGAL FOUNDATION CASES* ON PHARMACEUTICAL MANUFACTURER PRACTICES IN THE UNITED STATES

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INTRODUCTION

Pharmaceutical manufacturers spend billions of dollars each year on promotional activities.[1] Until recently, the kind of information that a company sales representative could share with healthcare providers was restricted to data on Food and Drug Administration (FDA)-approved uses of a product. However, on July 30, 1998, the U.S. District Court for the District of Columbia held in *Washington Legal Foundation v. Friedman* (WLF I) that the FDA's policies and guidelines restricting the ability of pharmaceutical manufacturers to distribute certain types of "off-label" information for additional uses of already-approved products to healthcare professionals were unconstitutional restraints on speech.[2] On July 28, 1999, the same court held in *Washington Legal Foundation v. Henney* (WLF II) that its earlier decision also applied to Section 401 of the recently enacted Food and Drug Administration Modernization Act of 1997

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1. One of the world's largest pharmaceutical manufacturers, based on IMS Health, is Merck & Co., which spent approximately $4.5 billion on sales and marketing activities in 1998. *See* 1998 ANNUAL REPORT FOR MERCK & CO., *at* http://www.merck.com.overview/98ar/. Examples of manufacturer promotional activities include detailing (discussions with healthcare professionals) done by company sales personnel, placing advertisements in industry and medical journals, providing healthcare professionals with printed information on company products, and direct-to-consumer advertising. *See, e.g.*, Lars Noah, *Death of a Salesman: To What Extent Can the FDA Regulate the Promotional Statements of Pharmaceutical Sales Representatives?*, 47 FOOD & DRUG L.J. 309, 311-12 (1992).

2. Washington Legal Found. v. Friedman, 13 F. Supp. 2d 51, 74 (D.D.C. 1998), *appeal dismissed, vacated in part*, 202 F.3d 331 (D.C. Cir. 2000).

(FDAMA), which outlined the terms under which pharmaceutical manufacturers would be permitted to disseminate off-label information.[3] The FDA appealed both decisions and on February 11, 2000, the U.S. Court of Appeals for the District of Columbia Circuit decided the case[4] with each side interpreting the court's ruling differently and both sides declaring victory.[5]

Off-label information is information not contained in a product's FDA-approved labeling and, as such, information that has not necessarily received a rigorous review by the agency.[6] Prior to these holdings, the FDA placed significant hurdles in front of companies that wanted to disseminate off-label information about unapproved uses of drugs to healthcare professionals.[7] While the FDAMA purported to lessen these restrictions, significant pre-dissemination requirements contained therein prevent much of the available information on unapproved uses of drugs from being shared with healthcare professionals.[8] Interestingly, the FDA does not restrict physicians from prescribing drugs for unapproved uses, nor does it prevent manufacturers from providing information

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3. Washington Legal Found. v. Henney, 56 F. Supp. 2d 81, 88 (D.D.C. 1999), *appeal dismissed, vacated in part*, 202 F.3d 331 (D.C. Cir. 2000).

4. *See* Washington Legal Found. v. Henney, 202 F.3d 331 (D.C. Cir. 2000).

5. *See* Lisa Richwine, *USA: Court Dismisses FDA Appeal on Drug Promotion*, REUTERS ENG. NEWS SERV., Feb. 11, 2000. "The bottom line of the case is that the provision that Congress passed in FDAMA [the Food and Drug Administration Modernization Act] stays in effect." *Id.* (quoting an FDA official). "The Washington Legal Foundation (WLF) won a major victory today in its long-running battle against Food and Drug Administration (FDA) speech restrictions. . . . [The] 'FDA no longer will be permitted to ban speech about off-label uses of drugs unless it has real reason to believe that the information is false.'" Press Release, Washington Legal Foundation, Appeals Court Affirms Injunction Against FDA Speech Restrictions (Feb. 11, 2000) (quoting Richard Samp, WLF Chief Counsel) (on file with author). The decision has also confused those not associated with the case. "'It is not clear whether this is a return to the situation that existed before or whether FDA has a burden to show more than dissemination of information' to bring action against a company." Richwine, *supra*. *See also* discussion *infra* Part IV.

6. According to federal regulations, prescription drug labeling must "contain a summary of the essential scientific information needed for the safe and effective use of the drug." 21 C.F.R. § 201.56(a) (2000). Whenever possible the information contained within the label should be based on "data derived from human experience." 21 C.F.R. § 201.56(c). The label contains information on the following: clinical pharmacology, indications and usage, contraindications, warnings, precautions, adverse reactions, drug abuse and dependence, overdose, dosage and administration, and how the drug is supplied. 21 C.F.R. § 201.56(d)(1). *See also* Steven R. Salbu, *Off-Label Use, Prescription, and Marketing of FDA-Approved Drugs: An Assessment of Legislative and Regulatory Policy*, 51 FLA. L. REV. 181, 187-88 (1999) (defining off-label, off-label use, off-label prescription, and off-label promotion and marketing).

7. *See* Jeffrey N. Gibbs, *First Amendment Limits on Regulating Information: An Initial Reaction to the Washington Legal Foundation Case*, 53 FOOD & DRUG L.J. 597, 597 (1998).

8. *See* Anne Marie Murphy, *"It's Time to Make a Good Agency Better": The Food and Drug Administration Modernization Act of 1997 and the First Amendment*, 53 FOOD & DRUG L.J. 603, 603-04 (1998).

on unapproved uses in response to unsolicited questions.[9]

For proponents of allowing less restrictive dissemination of off-label information, WLF I and II are very encouraging. These proponents contend that the dissemination of off-label information by pharmaceutical companies will benefit society by making medical professionals quickly aware of effective new uses of older treatments.[10] For opponents of this practice, WLF I and II represent a setback. Opponents favor strict FDA control and contend that allowing manufacturers to disseminate off-label information to medical professionals will adversely affect society because the data being shared has not been subjected to the same rigorous review as the data upon which an FDA-approved use is based.[11] The FDA also supports this position.[12] This issue is obviously important to pharmaceutical manufacturers who will likely benefit economically if allowed to disseminate off-label information and thereby increase utilization of their products in new markets. It is also important to doctors and patients because of the length of time it takes manufacturers to conduct clinical trials testing for new uses[13] and for the FDA to approve new uses for already-approved drugs.[14]

This Note will explore the impact of the *Washington Legal Foundation Cases* on pharmaceutical manufacturer practices in the United States. Part I will

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9. *See* Linda A. Suydam, Keynote Address for FDLI Conference on Advertising and Promotion in the New Millennium 5-6 (Sept. 13, 1999), *at* http://www.fda.gov/OC/speeches/offlabel.html. The FDA acknowledges that "the legislative history of the Federal Food, Drug, and Cosmetic Act shows that Congress did not intend FDA to interfere with the practice of medicine, and FDA . . . has never had such a goal." *Id.* at 2. Additionally, the FDA does not want to control the publication of scientific data and does not prohibit a manufacturer from sharing off-label information that has been requested by a medical doctor. *See id.* at 6. Instead, the FDA's concern is promotion of off-label information by pharmaceutical manufacturers. *See id.*

10. *See* Salbu, *supra* note 6, at 193-95.

11. *See id.* at 201-10.

12. *See* Washington Legal Found. v. Friedman, 13 F. Supp. 51, 57 (D.D.C. 1998), *appeal dismissed, vacated in part*, 202 F.3d 331 (D.C. Cir. 2000).

13. A study conducted at the Tuft's Center for the Study of Drug Development showed that the average clinical development time for new drugs approved by the FDA between 1996-1998 was 5.9 years. *See* FDA OFFICE OF PLANNING, *Fiscal Year 1999 Performance Report to Congress for the Prescription Drug User Fee Act of 1992* (Food and Drug Administration, Rockville, MD), 1999, *at* http://www.fda.gov/ope/pdufa/report99/default.html [hereinafter *1999 Performance Report*]. However, a manufacturer may be allowed to do less clinical development for a new use resulting in a slight reduction in development time. *See* MARK MATHIEU, NEW DRUG DEVELOPMENT: A REGULATORY OVERVIEW 293 (Parexel Int'l Corp., 4th ed. 1997).

14. In 1998, the median FDA-approval time for new or expanded uses for already-approved drugs was 11.8 months. *See Improving Public Health Through Human Drugs*, CDER 1998 REPORT TO THE NATION (Food and Drug Administration, Rockville, MD), 1998, at 10, http://www.fda.gov/cder/reports/rptntn98.pdf. In 1999, the FDA reviewed and acted upon ninety percent of efficacy supplements (supplements for new uses) within twelve months. *See 1999 Performance Report*, *supra* note 13.

define off-label information and provide an overview of the arguments for and against the dissemination of this information by pharmaceutical companies. Part II will provide relevant background on the restrictions placed on pharmaceutical companies by the FDA prior to the holdings in WLF I and II. Part III will discuss the procedural history of the *Washington Legal Foundation Cases* and fully review the framework established by Judge Royce C. Lamberth in WLF I regarding dissemination of off-label information by pharmaceutical companies. This part will also review the U.S. Court of Appeals' recent decision. Part IV will posit that other factors, beyond FDA intervention, protect both consumers and competitors from the purported harms associated with pharmaceutical company dissemination of off-label information. In addressing these factors, which include product liability claims, civil suits by other manufacturers under the Lanham Act, and the realities of the pharmaceutical marketplace, this part will delve into the relevant areas of law. Additionally, uncertainties created by the decisions in WLF I, WLF II, and the recent U.S. Court of Appeals' decision will be discussed. Part V will argue that the framework established by WLF I, when combined with product liability laws, the Lanham Act, and the pressures of the pharmaceutical market, create an environment permitting the dissemination of off-label information by manufacturers, while still providing adequate protection for society, but only if existing uncertainties are resolved. Finally, this part will suggest potential solutions to the existing uncertainties.

I. DISSEMINATION OF OFF-LABEL INFORMATION BY PHARMACEUTICAL COMPANIES: ARGUMENTS FOR AND AGAINST

In the United States, off-label information is, by definition, information that is not included in a drug's FDA-approved package insert.[15] The package insert is proposed by the pharmaceutical manufacturer and approved by the FDA when the new drug or new use for an already-marketed drug is evaluated.[16] Therefore, off-label information generally has not received the rigorous review required for approval of a product or a new use. It is not disputed either that physicians should be able to prescribe drugs for off-label use or that information about off-label uses can be published.[17] The controversy surrounding off-label information centers upon whether pharmaceutical manufacturers should be allowed to disseminate this information about new uses of already approved products to healthcare professionals.[18] Arguments exist both favoring and disfavoring

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15. *See* discussion *supra* note 6. Because of the large amount of information required to be included in a prescription drug label, it is difficult for a manufacturer to place the information on a product's immediate container. Therefore, manufacturers include the information in a package insert that is affixed to the drug's container or packaging. *See* MATHIEU, *supra* note 13, at 224-25; *see also* Salbu, *supra* note 6, at 187.

16. Approval of a prescription drug's package insert is usually the last step in the FDA's drug approval process. *See* MATHIEU, *supra* note 13, at 223.

17. *See* Suydam, *supra* note 9, at 5-6.

18. *See* Salbu, *supra* note 6, at 191-92.

pharmaceutical manufacturer dissemination of off-label information.

A. Arguments For the Dissemination of Off-Label Information

Proponents for a more open policy on the dissemination of off-label information argue that because the practice of prescribing drugs off-label is prevalent, information should be readily available to help physicians make informed decisions.[19] Although the exact number is disputed, between twenty and sixty percent of prescriptions are for off-label uses.[20] The FDA recognizes that prescribing drugs for off-label uses can be beneficial and does not regulate the activity.[21] Moreover, because physicians receive a large amount of information from pharmaceutical sales representatives,[22] placing restrictions on manufacturer dissemination of off-label information may lead to patients not receiving optimal treatments.

In addition, much of today's medical research is funded by the pharmaceutical industry. Proponents argue that manufacturers have the greatest resources and incentive to share the latest information with healthcare professionals.[23] While the FDA's review process for new product uses has improved, FDA approval still lags behind the availability of the most innovative approaches and therapies.[24] Thus, preventing pharmaceutical manufacturers from disseminating off-label information until new uses are approved hampers one of the key avenues for sharing information with the largest number of physicians. Additionally, proponents argue that physicians are highly educated and well-equipped to read a peer-reviewed article and make sound medical decisions on the basis of published data, regardless of the data's source.[25] As the court noted in WLF I, "[w]hy the ability of a doctor to critically evaluate scientific findings depends upon how the article got into a physician's hands . . . is unclear to this court."[26]

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19. *See id.* at 193-95.

20. *See id.* at 193; Washington Legal Found. v. Friedman, 13 F. Supp. 2d 51, 56 (D.D.C. 1998), *appeal dismissed, vacated in part*, 202 F.3d 331 (D.C. Cir. 2000). In some therapeutic areas, like oncology, off-label use is often considered to be state-of-the art treatment. *See* Gail Dutton, *Should You Let the FDA Decide What Drugs You Pay For?*, BUS. & HEALTH, Oct. 1, 1996, at 65.

21. *See* Suydam, *supra* note 9, at 2.

22. *See* Noah, *supra* note 1, at 311-12.

23. *See* Salbu, *supra* note 6, at 198–99.

24. *See* Nancy K. Plant, *Prescription Drug Promotion on the Internet: Tool for the Inquisitive or Trap for the Unwary?*, 42 ST. LOUIS U. L.J. 89, 97 (1998); *see also* discussion *supra* note 14.

25. *See* Washington Legal Found. v. Friedman, 13 F. Supp. 2d 51, 70 (D.D.C. 1998), *appeal dismissed, vacated in part*, 202 F.3d 331 (D.C. Cir. 2000).

26. *Id.*

B. Arguments Against the Dissemination of Off-Label Information

Opponents of off-label dissemination by manufacturers contend that instead of helping society, this practice is harmful.[27] They favor more involvement by the FDA and feel that the only way to protect society is via the FDA's rigorous review and approval process.[28] This is the view advanced by the FDA.[29] Opponents cite examples of where the latest medical breakthroughs published in a peer-reviewed journal either turn out to be wrong or were actually harmful to patients.[30] They also contend that new uses of drugs are not significantly different from experimental new drugs and, as such, should go through the same thorough review and approval process.[31]

In addition, opponents fear that pharmaceutical manufacturers will no longer have any incentives to complete the necessary studies to receive FDA approval for new uses of their products.[32] They also fear that pharmaceutical manufacturers will not provide a fair, balanced review of information to physicians when they discuss off-label uses.[33] Because pharmaceutical companies are in the business of making money on their products, the fear exists that they will have little incentive to discuss their products' risks or the results of other studies with adverse or contrary findings.[34] They further contend that the FDA does not restrict the publication of off-label uses and that physicians are able to access this information through textbooks, on-line databases, peer-review journals, and continuing education programs.[35]

II. THE REGULATORY/LEGAL ENVIRONMENT PRIOR TO WLF

The FDA has the authority to regulate the labeling and advertising of prescription pharmaceuticals under the Federal Food, Drug, and Cosmetic Act (FDCA).[36] Labeling is broader than just the label on the bottle; it also includes the product's package insert and all promotional materials including the detailing brochures used by the manufacturer to promote sales of the product.[37] Under the

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27. *See* Salbu, *supra* note 6, at 201.

28. *See* Suydam, *supra* note 9, at 1.

29. *See id.*

30. *See id.* at 4. These examples include significant cardiovascular problems arising from using the combination of fenfluramine and phentermine off-label for weight-loss, and the increased mortality associated with the off-label use of the anti-arrhythmic drugs, encainide and flecainide, in certain heart attack patients that was thought to decrease mortality. *See* Washington Legal Found. v. Friedman, 13 F. Supp. 2d 51, 56 (D.D.C. 1998); *American Home Products Corp. Settles Wrongful-Death Suit Over a Diet Drug*, WALL ST. J., June 23, 1999, at B17.

31. *See* Salbu, *supra* note 6, at 204.

32. *See* Suydam, *supra* note 9, at 2.

33. *See* Salbu, *supra* note 6, at 206–07.

34. *See id.*

35. *See* Suydam, *supra* note 9, at 2.

36. 21 U.S.C. §§ 301, 393 (1999).

37. *See* 21 C.F.R. § 202.1(1)(2) (1996).

FDCA, the FDA must use the formal rule making process to promulgate regulations.[38] However, the FDA often avoids the formal rule making process outlined in the Act by producing Guidance Documents, which, while not binding on the FDA or the industry, are generally followed by the industry.[39]

On October 8, 1996, the FDA published two Guidance Documents concerning the dissemination of data from medical and scientific textbooks and reprints of articles from scientific and medical journals.[40] With regard to reprints of scientific and medical journals, the Guidance Documents required that the "principal subject of the article should be the use(s) or indication(s) that has been approved by the FDA."[41] They further required that "[t]he reprint should be from a bona fide peer-reviewed journal" and if the article contained information that differed from the FDA-approved prescription drug label "the reprint should prominently state the difference(s), with specificity, on the face of the reprint."[42] With regard to textbooks, the Guidance Documents required that the textbook should not have been written or published specifically for a manufacturer or reviewed or edited or significantly influenced by a manufacturer.[43] Additionally, the text "should not be distributed only or primarily through drug, device, or biologic firms" and the text should not focus on the disseminating company's particular product(s).[44] Finally, commenting on the off-label information that is often contained in such medical articles, the Guidance Documents stated that the text should not have a "significant focus on unapproved uses of the drug(s), device(s), or biologic(s) marketed or under investigation by the firm supporting the dissemination of the text."[45]

Prior to the 1997 passage of the FDAMA, the FDA strongly opposed the dissemination of off-label information by a manufacturer. The agency and at least one U.S. Attorney deemed the activity appropriate for criminal enforcement.[46] The FDAMA represented the first significant change to the

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38. *See* 21 U.S.C.A § 371 (1999).

39. *See id.* § 371(h)(1)(a); Plant, *supra* note 24, at 93.

> Although guidance documents cannot legally bind FDA or the public, the agency recognizes the value of guidance documents in providing consistency and predictability. A company wants assurance that if it chooses to follow a guidance document, FDA generally will find it to be in compliance with the statute and regulations.... With these principles in mind, FDA's decisionmakers will take steps to ensure that their staff do not deviate from guidance documents without appropriate justification and without first obtaining concurrence from a supervisor.

Food and Drug Administration's Development, Issuance, and Use of Guidance Documents, 62 Fed. Reg. 8961, 8963 (Feb. 27, 1997).

40. *See* Advertising and Promotion; Guidances, 61 Fed. Reg. 52800 (Oct. 8, 1996).

41. *Id.* at 52801.

42. *Id.*

43. *See id.*

44. *Id.*

45. *Id.*

46. *See* I. Scott Bass et al., *Off-Label Promotion: Is FDA's Final Guidance on Industry-*

FDCA since 1962.[47]

The FDAMA contained numerous revisions to the FDCA, including section 401, a provision which, for the first time, allowed pharmaceutical manufacturers to disseminate off-label information under certain circumstances.[48] One such requirement under the FDAMA is the dissemination to certain groups only: health care practitioners, pharmacy benefit managers, health insurance issuers, group health plans, and governmental agencies.[49] Additionally, under the FDAMA, manufacturers can only disseminate authorized information contained in either unabridged peer-reviewed articles or certain qualified reference publications.[50] Also, the information cannot derive from research conducted by another manufacturer unless that manufacturer provides permission to disseminate the information.[51] At least sixty days prior to the dissemination, the manufacturer must submit the information to the Secretary of Health and Human Services and provide any additional safety and efficacy data the manufacturer has on the product.[52] Most importantly, under the FDAMA, manufacturers can only disseminate off-label information if either they are actively pursuing FDA approval to market the new use or the pursuit of such approval would be cost-prohibitive or unethical.[53]

When manufacturers disseminate off-label information, they must prominently affix to the information a disclaimer that the information concerns a use of a drug or device that has not been approved by the FDA and, if applicable, that other drugs are approved for this use.[54] Manufacturers must also identify how the research was funded and any affiliations between the authors

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Supported Scientific and Educational Programs Enforceable?, 53 FOOD & DRUG L.J. 193, 193-94 (1998). The actual offense or charge against the pharmaceutical company would be "misbranding" under 21 U.S.C.A. § 331(b) (1999). A product is misbranded if its labeling or advertising do not comport with the FDCA. *See* 21 U.S.C.A. § 352 (1999). Penalties for misbranding and other violations of section 331 are set forth in section 333(a), "[a]ny person who violates a provision of section 331 of this title shall be imprisoned for not more than one year or fined not more than $1,000, or both." *Id.* § 333(a)(1).

47. *See* Food and Drug Administration Modernization Act of 1997, Pub. L. No. 105-115, 111 Stat. 2296 (1997) (codified as amended in scattered sections of 21 U.S.C.A. § 301 (2000)).

48. *See* 21 U.S.C.A. § 360aaa-6.

49. *See id.* § 360aaa(a).

50. *See id.* § 360aaa-1.

51. *See id.* § 360aaa(b)(3).

52. *See id.* § 360aaa(b)(4).

53. *See id.* § 360aaa-3. The vehicle by which a drug sponsor, or pharmaceutical company formally asks the FDA to approve the sale of a new pharmaceutical is the New Drug Application (NDA). *See* MATHIEU, *supra* note 13, at 165. Once a company has its product approved for sale by the FDA, the company "can access and 'supplement' the [original] application's data to seek FDA authorization to market variations of the drug beyond those provided for in the approved NDA." *Id.* at 283. This supplement is called a Supplemental NDA (sNDA).

54. *See* 21 U.S.C.A. § 360aaa(b)(6) (1999).

and the disseminating company.[55] Lastly, manufacturers must include a bibliography of similar research.[56] While FDAMA opened the door slightly to the dissemination of some off-label information, it placed significant limitations on the exchange of scientific information between pharmaceutical companies and healthcare professionals.

III. PROCEDURAL HISTORY OF THE WLF CASES AND THE NEW FRAMEWORK ESTABLISHED

In 1993, the WLF, a public interest law and policy center, filed a citizen's petition with the FDA challenging the agency's restrictions on distribution of off-label information by manufacturers on constitutional grounds.[57] The FDA did not grant the petition, and the WLF filed a lawsuit in 1994 challenging the FDA's restrictions based on the First Amendment.[58] The FDA unsuccessfully challenged the action on procedural grounds: first ripeness and then standing.[59]

On July 30, 1998, the U.S. District Court for the District of Columbia found the FDA's restrictions on the dissemination of off-label information to be in conflict with the First Amendment and entered an injunction against FDA regulations restricting manufacturer dissemination of the kinds of off-label articles described in the order.[60] The court determined that dissemination of information by pharmaceutical companies constituted commercial speech, not pure speech.[61] In determining whether the FDA's restrictions on this commercial speech were unconstitutional, the court applied the four-prong test set forth by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[62] Under this test, the government can restrict commercial speech if: (a) the speech is unlawful or inherently misleading; (b) the government's interest in the speech is substantial; (c) the restrictions on speech directly advance the government's interest; and (d) the means employed

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55. *See id.*

56. *See id.* § 360aaa(b)(6)(B).

57. *See* Washington Legal Found. v. Kessler, 880 F. Supp. 26, 30 (D.D.C 1995). At issue was an FDA policy that prohibited the dissemination of off-label information by a manufacturer except in very narrow circumstances. *See id.* at 27-28.

58. *See id.* at 30.

59. *See id.* at 31-36.

60. *See* Washington Legal Found. v. Friedman, 13 F. Supp. 2d 51, 74 (D.D.C. 1998), *appeal dismissed, vacated in part*, 202 F.3d 331 (D.C. Cir. 2000). By the time this case was heard the FDA's policies on dissemination of off-label information had been published as Guidance Documents. *See supra* note 39 and accompanying text.

61. *See Friedman*, 13 F. Supp. 2d at 65. How speech is classified is very important to the court's analysis. "[C]ommercial speech, . . . is subject to a more relaxed inquiry than core First Amendment speech." *Id.* at 59. The primary purpose of this doctrine is the protection of "consumers from misleading, deceptive or aggressive sales practices." *Id.* at 65 (quoting 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996)).

62. *See id.* at 65-74.

fit the end sought.[63]

In applying the first prong of the *Central Hudson* test, the court found that this type of speech-dissemination of off-label information is neither unlawful nor inherently misleading.[64] Under the second prong, the court found that Congress' mandate that the FDA must prove all drugs safe and effective established the FDA's interest in limiting off-label information as substantial.[65] Under the third prong, the court determined incentives for manufacturers to do clinical testing necessary for FDA approval directly advanced the government's interests.[66] Finally, under the fourth prong of the test, the court held that the means employed by the FDA were more extensive than necessary and that other less restrictive alternatives could be employed to advance the FDA's interests.[67] However, this decision did not resolve the issue because Congress contemporaneously enacted the FDAMA. Section 401 of this new act addressed manufacturer dissemination of off-label information and established a new regulatory framework.[68] Therefore, the parties returned to court seeking clarification of WLF I's decision as applied to the FDAMA. In WLF II, the same court held that the injunction also applied to Section 401 of the recently enacted FDAMA.[69]

The decision in WLF I established the framework under which the dissemination of off-label information could occur by defining what the FDA could and could not restrict. In WLF I, the court enjoined the FDA from prohibiting, restricting, sanctioning, or in any way limiting pharmaceutical or device manufacturers from doing the following:

> a) from disseminating or redistributing to physicians or other medical professionals any article concerning prescription drugs or medical devices previously published in a bona fide peer-reviewed professional journal, regardless of whether such article includes a significant or exclusive focus on uses of drugs or medical devices other than those approved by FDA and regardless of whether such

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63. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 564-66 (1980).

64. *See Friedman*, 13 F. Supp. 2d at 69.

65. *See id.* at 71.

66. *See id.* at 72.

67. *See id.* at 73-74. The court proposed less restrictive alternatives, including "full, complete, and unambiguous disclosure" by the pharmaceutical company. *Id.* at 73. "Full disclosure not only addresses all of the concerns advanced by the FDA, but addresses them more effectively." *Id.* The court also suggested that pharmaceutical companies still have incentives to seek approval from the FDA for new uses, including potential protections under some tort law principles, and are still prohibited from "producing and distributing any internally-produced marketing materials to physicians concerning off-label uses." *Id.*

68. *See supra* note 47 and accompanying text.

69. *See* Washington Legal Found. v. Henney, 56 F. Supp. 2d 81 (D.D.C. 1999), *appeal dismissed, vacated in part*, 202 F.3d 331 (D.C. Cir. 2000).

article reports the original study on which FDA approval of the drug or device in question was based;

b) from disseminating or redistributing to physicians or other medical professionals any reference textbook (including any medical textbook or compendium) or any portion thereof published by a bona fide independent publisher and otherwise generally available for sale in bookstores or other distribution channels where similar books are normally available, regardless of whether such reference textbook or portion thereof includes a significant or exclusive focus on uses of drugs or medical devices other than those approved by FDA; or

c) from suggesting content or speakers to an independent program provider in connection with a continuing medical education seminar program or other symposium, regardless of whether uses of drugs and medical devices other than those approved by FDA are to be discussed.[70]

On the other hand, the court recognized that the FDA could require a pharmaceutical manufacturer to disclose its financial interest in the study discussed and to disclose that the use being discussed in the study does not have FDA approval.[71] Finally, the court held that the FDA would continue to have authority to regulate articles or texts that were false or misleading.[72] The decisions in WLF I and WLF II represent significant departure from the previous regulatory regime.

In response to these decisions, the FDA appealed WLF II, "contending that the district court erred in concluding the FDAMA . . . [is] unconstitutional."[73] The U.S Court of Appeals for the District of Columbia Circuit heard the case on January 10, 2000 and issued its opinion a month later on February 11, 2000.[74] The Court's decision has been called unclear, and both parties claimed victory after hearing the ruling.[75]

Interestingly, the court did not reach the constitutional issue.[76] Instead, the court dismissed the FDA's appeal and vacated the district court's decisions and

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70. Washington Legal Found. v. Friedman, 13 F. Supp. 2d 51, 74-75 (D.D.C. 1998), *appeal dismissed, vacated in part*, 202 F.3d 331 (D.C. Cir. 2000). The court also provided definitions for "bona fide peer-reviewed journal," "bona fide independent publisher," and "independent program provider" to help decrease any potential confusion. *Id.* at 75.

71. *See id.*

72. *See id.*

73. Washington Legal Found. v. Henney, 202 F.3d 331, 335 (D.C. Cir. 2000).

74. *See id.* at 331.

75. *See* discussion *supra* note 5.

76. *See Henney*, 202 F.3d at 336. "The stage therefore appeared set for us to consider a difficult constitutional question of considerable practical importance. However, as a result of the government's clarification at oral argument, the dispute between the parties has disappeared before our eyes." *Id.* at 335.

injunctions, "insofar as they declare the FDAMA . . . unconstitutional."[77] The court further explained in a footnote, "[a]s we have made clear, we do not reach the merits of the district court's First Amendment holdings and part of its injunction still stands."[78] The court's decision appears to be based on the FDA's assertions that the FDAMA did not authorize the FDA to restrict speech. Instead, the FDA asserted the FDAMA "established nothing more than a 'safe harbor' ensuring that certain forms of conduct would not be used against manufacturers in misbranding and 'intended use' enforcement actions based on pre-existing legislative authority."[79] Once WLF heard the FDA's position, their attorney stated in oral argument that WLF no longer had a constitutional objection to the FDAMA.[80]

However, the FDA maintained that it could use "[dissemination of off-label information] as evidence in a misbranding or 'intended use' enforcement action."[81] The court left open the possibility that a manufacturer "may still argue that the FDA's use of a manufacturer's promotion of off-label uses as evidence in a particular enforcement action violates the First Amendment."[82] Again, the decision is unclear at best. Once the FDA clarified its position on the FDAMA, the court of appeals was of the opinion that the constitutional issues were removed.[83] Left open is whether the FDA's ability to utilize other provisions of the FDCA to limit the dissemination of off-label information and bring enforcement actions against manufacturers could successfully be challenged as unconstitutional. While an extremely important issue, the constitutional questions presented by the WLF cases are not the focus of this Note. Instead this Note addresses the ability of the combination of the previously established framework in WLF I plus product liability law, unfair competition laws, and the pharmaceutical marketplace to protect society from the purported harms of this

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77. *Id.* at 337.

78. *Id.* at 337 n.7. However, on November 30, 2000, the District Court for the District of Columbia denied a motion by WLF to confirm and enforce whatever portion of the injunction remained intact following the court of appeals' decision. The motion made by WLF was prompted by the FDA's March 16, 2000 Notice published in the Federal Register that outlined the FDA's opinion of their scope of authority after the court of appeals' decision. Although the court of appeals' decision appeared to potentially leave the injunction intact in so far as it was not based on the federal constitution, the district court found that the injunction was based entirely on the federal constitution, and as a result no portion of the injunction remains in effect. Judge Lamberth was notably frustrated in how the court of appeals avoided the constitutional question, and his opinion suggests that if the FDA uses dissemination of off-label information as part of an enforcement action against a pharmaceutical manufacturer, the manufacturer will have a legitimate constitutional argument, at least if they wind up back in his court. *See* Washington Legal Found. v. Henney, No. 94-1306 (D.D.C. Nov. 30, 2000).

79. *Henney*, 202 F.3d at 335.

80. *See id.* at 336.

81. *Id.*

82. *Id.* at 336 n.6.

83. *See supra* note 76.

practice while allowing dissemination by manufacturers of truthful information on the off-label uses of pharmaceuticals.

IV. OTHER IMPORTANT PROTECTIONS RELATING TO THE DISSEMINATION OF OFF-LABEL INFORMATION

While some contend that the best way to protect society from indiscriminate drug use is for the FDA to tightly control the dissemination of off-label information and that the holdings in the WLF I and II jeopardize patient safety, other protective mechanisms are already in place. The three most important protections for society are potential product liability claims, potential claims by competitors under the Lanham Act, and the pressures associated with the pharmaceutical market.

A. Product Liability

Pharmaceutical companies will need to balance the benefit of disseminating off-label information with the increased risk of product liability claims. Product liability claims can have a significant economic impact, costing defendants millions of dollars.[84] In a sense, tight control over off-label information by the FDA actually prevented companies from injuring themselves.[85] Although ultimately settled out of court, American Home Products argued that they should not be liable for alleged harms resulting from the off-label use of the fen-phen combination because they did not disseminate information on this use.[86] Product liability claims are a mechanism for consumers to seek compensation for product-related injuries (including those caused by pharmaceuticals), and courts appear undecided on how to address uses of medications not approved by the FDA.

Cases involving design or manufacturing defects in pharmaceuticals are rare.[87] The reasons for this are varied, but generally it is because Good

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84. In 1984, A.H. Robins lost fourteen product liability cases with average awards being $4.1 million. In 1986, Merrell Dow lost eleven cases with average awards of $7.1 million. *See* W. Kip Viscusi et al., *A Statistical Profile of Pharmaceutical Industry Liability, 1976-1989*, 24 SETON HALL L. REV. 1418, 1428 (1994). More recently, American Home Products settled a wrongful-death lawsuit relating to use of one of its former diet drugs for an amount believed to be about $10 million. *See* Robert Langreth & Richard B. Schmitt, *American Home Settles Diet-Drug Case, Woman's Estate to Get About $10 Million*, WALL ST. J., Jan. 28, 2000, at B9. In a similar lawsuit, a jury ordered American Home Products to pay more than $23 million, sending the company's stock down twelve percent. See Robert Langreth, *American Home Is Ordered to Pay $23.36 Million in Diet-Drug Suit*, WALL ST. J., Aug. 9, 1999, at A4.

85. *See* Amy Barrett, *Take Only As Directed (Wink)*, BUS. WK., Aug. 16, 1999, at 44. "The FDA prevented you from doing a lot of injury to yourself." *Id.* (quoting William W. Vodra, an attorney who represented American Home Products).

86. *See id.* American Home Products, a large pharmaceutical company, manufactured fenfluramine, the "fen" portion of fen-phen, a popular combination used for weight loss.

87. *See* Michael D. Green, *Safety as an Element of Pharmaceutical Quality: The Respective*

Manufacturing Practices (GMPs) are followed closely by the industry and monitored by the FDA.[88] Additionally, it is difficult for plaintiffs to demonstrate that an alternative design for a pharmaceutical was technically feasible.[89] Also, in order to prevail in a design defect case, the plaintiff must be able to show that the foreseeable risks of the pharmaceutical outweigh its foreseeable therapeutic benefits.[90] Courts have been reluctant to find that a drug's overall risks outweigh its benefits.[91] As a result, most pharmaceutical product liability cases deal with failure to warn.[92]

According to the Restatement (Third) of Torts:

> A prescription drug or medical device is not reasonably safe due to inadequate instructions or warnings if reasonable instructions or warnings regarding foreseeable risks of harm are not provided to:
>
> (1) prescribing and other health-care providers who are in a position to reduce risks of harm in accordance with the instructions or warnings; or (2) the patient when the manufacturer knows or has reason to know that health-care providers will not be in a position to reduce the risks of harm in accordance with the instructions or warnings.[93]

Historically, courts have held that a manufacturer typically does not need to warn patients directly.[94] Instead the manufacturer must only warn the physician

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Roles of Regulation and Tort Law, 42 ST. LOUIS U. L.J. 163, 168 (1998). A product has "a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(a) (1997). A product has a design defect when "the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1997).

88. *See* Green, *supra* note 87, at 168.

> GMP's mean the requirements found in the legislations, regulations, and administrative provisions for methods to be used in, and the facilities or controls to be used for, the manufacturing, processing, packing, and/or holding of a drug to assure that such drug meets the requirements as to safety, and has the identity and strength, and meets the quality and purity characteristics that it purports or is represented to possess.

21 C.F.R. § 26.1(c)(1) (2000).

89. *See* Green, *supra* note 87, at 168.

90. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 8 (1997).

91. *See* Green, *supra* note 87, at 169.

92. *See id.*

93. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 6(d) (1997).

94. *See* Sottlemire v. Cawood, 213 F. Supp. 897 (D.D.C. 1963); *cf.* Perez v. Wyeth Lab., Inc., 734 A.2d 1245 (N.J. 1999) (holding that with regard to an implanted birth control device the manufacturer had a duty to warn patients directly). Courts have held that "[o]ral contraceptives . . . bear peculiar characteristics which warrant the imposition of a common law duty on the manufacturer to warn users directly of associated risks." MacDonald v. Ortho Pharm. Corp., 475

who prescribes the medication. This is called the "learned intermediary" doctrine.[95] Because the physician is in the best position to determine whether the benefits of the drug outweigh its risks for the particular patient, the doctrine exempts manufacturers from liability if it provides a physician with all information available to allow the physician to make an informed medical judgment.[96] Currently, all product liability cases are decided under state standards, because no federal product liability law exists.[97]

One reason manufacturers resist disseminating off-label information is that FDA approval provides some protection. In some ways, the FDA's prohibition on dissemination of off-label information has actually protected pharmaceutical companies from themselves.[98] At least four states (Arizona, Ohio, Oregon, and Utah) have statutes that bar punitive damages in cases where the manufacturer complied with FDA regulations in bringing a product to market, including packaging and labeling provisions.[99] Additionally, FDA approval is at least one factor considered by other jurisdictions that do not have a statutory defense.[100]

There is also a growing movement that FDA approval should provide even more protection for pharmaceutical manufacturers. In fact, several commentators have suggested that FDA approval should be an absolute bar to product liability actions, dubbed the "FDA Defense," and advance several rationales. First, the FDA makes a risk/benefit decision when it approves new drugs and new indications.[101] Second, the FDA is in a better position than judges or juries to make these determinations.[102] Third, the FDA regulates the labeling and therefore controls "warnings."[103] Fourth, the FDA is effective in enforcing its regulations.[104] Finally, federal preemption of state law would lead to more

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N.E.2d 65, 69 (Mass. 1985).

95. *See* Johnson v. Am. Cyanamid Co., 718 P.2d 1318, 1324 (Kan. 1986), *aff'd*, 758 P.2d 206 (Kan. 1988).

96. *See id*; Jeffrey N. Gibbs & Bruce F. Mackler, *Food and Drug Administration Regulation and Products Liability: Strong Sword, Weak Shield*, 22 TORT & INS. L.J. 194, 198-99 (1987).

97. *See* Gibbs & Mackler, *supra* note 96, at 197.

98. *See* discussion *supra* note 85.

99. *See* ARIZ. REV. STAT. § 12-701 (1992); OHIO REV. CODE ANN. § 2307.801(C)(1)(a) (2000); OR. REV. STAT. § 30.927(1) (1999); UTAH CODE ANN. § 78-18-2 (1999); *see also* Annette L. Marthaler, *The FDA Defense: A Prescription for Easing the Pain of Punitive Damage Awards in Medical Products Liability Cases*, 19 HAMLINE L. REV. 451, 461 (1996) (reviewing actions states have taken to implement an FDA Defense).

100. *See* Gibbs & Mackler, *supra* note 96, at 222; Jeffrey D. Winchester, *Section 8(C) of the Proposed Restatement (Third) of Torts: Is it Really What the Doctor Ordered?*, 82 CORNELL L. REV. 644, 656 (1997).

101. *See* Michael D. Green, *Statutory Compliance and Tort Liability: Examining the Strongest Case*, 30 U. MICH. J.L. REFORM 461, 474 (1997).

102. *See id.* at 477; David S. Torborg, *Design Defect Liability and Prescription Drugs: Who's in Charge?*, 59 OHIO ST. L.J. 633, 650 (1998).

103. *See* Green, *supra* note 101, at 475-76.

104. *See* Marthaler, *supra* note 99, at 483.

consistent outcomes.[105] If the proponents of the FDA defense prevail, pharmaceutical manufacturers will have significant incentives to seek FDA approval for new indications and changes in dosing and administration. As discussed below, even without such reform, the current environment that recognizes FDA-approval as at least a partial defense in a product liability lawsuit guides some pharmaceutical companies not to share information about off-label uses in certain jurisdictions.

Courts have utilized various approaches in addressing product liability claims stemming from off-label uses. One court held that a manufacturer is never liable for failure to warn of risks associated with off-label use.[106] Other courts have found no distinction between obligations associated with on- or off-label uses,[107] and others have looked to the acceptance of the use by the general medical community.[108] Another court based its decision on whether the manufacturer had benefitted from the use.[109] Finally, some courts have imposed liability when the

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105. *See* Torborg, *supra* note 102, at 657.

106. *See* Robak v. Abbott Lab., 797 F. Supp. 475 (D. Md. 1992). A physician prescribed an antibiotic for a use that was not approved by the FDA and was not in the antibiotic's FDA-approved labeling. *See id.* Additionally, the plaintiff presented evidence that the manufacturer had made claims that the antibiotic was effective in conditions beyond the approved labeling. *See id.* at 476. However, the court stated, "[i]t stands to reason that when a physician, as a learned intermediary, has been provided with the indications for which a drug is effective, but prescribes it for a non-indicated use, the manufacturer should not be exposed to tort liability for any defect in labeling." *Id.* at 476.

107. *See* Hahn v. Richter, 628 A.2d 860 (Pa. Super. Ct. 1993), *aff'd*, 673 A.2d 888 (Pa. 1996). A physician administered an injectable steroid in the spine, which was a route of administration that was not approved by the FDA. *See id.* The plaintiff alleged that the manufacturer knew or should have known of risks associated with this route of administration and also knew or should have known that physicians were using the product in this way. *See id.* at 863. The court did not distinguish between on- and off-label uses in its analysis. *See id.* at 863-68.

108. *See* Upjohn Co. v. MacMurdo, 562 So. 2d 680 (Fla. 1990). The plaintiff suffered injuries from the off-label use of a product for contraception, which was generally accepted in the medical community. *See id.* at 683. In the FDA-approved labeling for the product, the manufacturer stated that use of the product for contraception was investigational and not approved by the FDA; however, the court rejected the argument that the manufacturer had met its burden by warning that this use was not approved by the FDA. *See id.* at 682-83. This apparently suggests that if the use was generally accepted in the medical community, then the manufacturer had an additional duty to warn of adverse events associated with that use. *See id.* at 683.

109. *See* Miles Lab., Inc. v. Superior Court, 184 Cal. Rptr. 98 (Cal. Ct. App. 1982). A plaintiff suffered from injuries resulting from the off-label use of a product to prevent miscarriages and sued several manufacturers of the product. *See id.* at 99. One of the manufacturers alleged that its product had been developed for its FDA-approved use only and that it did not participate in any activities associated with getting physicians to use the product for the unapproved use. *See id.* at 99-100. However, a portion of the manufacturer's sales of the product was the result of the off-label use. *See id.* at 103. The court held that if the manufacturer knew or should have known of the off-label use and also benefitted from the off-label use, then it had a duty to warn of the possible

off-label use was foreseeable.[110] It is worth noting that all of the cases were decided when pharmaceutical manufacturers were prohibited from disseminating unsolicited information about off-label uses. One might predict that once manufacturers begin dissemination of off-label information under the rulings in WLF I and WLF II, the distinction between on- and off-label uses will begin to blur. These differences in state laws create challenges for pharmaceutical companies that promote and sell their products across many jurisdictions.

The plaintiffs in *In re Orthopedic Bone Screw Products Liability Litigation* recently advanced a separate but related cause of action: "fraud on the FDA."[111] In the case, the Third Circuit reversed a lower court ruling that a plaintiff could not bring a cause of action under the FDCA.[112] The case involved a device manufacturer and its consultant who first submitted to the FDA a request for approval for one use of its products that was denied.[113] The company then sought approval for another use, which was granted.[114]

The plaintiffs alleged that the manufacturer made material misrepresentations to the FDA and sought approval for the later use only as a pretext to make the product available for the previously rejected use.[115] The court held that "the plaintiffs' 'fraud on the FDA' theory of liability is not so at odds with traditional principles of tort law that [the manufacturer] is entitled to a dismissal of all claims against it at this stage."[116] Notably, the company tried to pursue an indication for the unapproved use at issue and their data was rejected by the FDA. This, as well as other facts negative to the manufacturer, likely makes this case distinguishable. Nevertheless, this case suggests that manufacturers who go for the easiest indications and then disseminate off-label information on other uses of their products might be at risk for this new, albeit untested, cause of action.

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adverse effects associated with the off-label use. *See id.*

110. *See* Medics Pharm. Corp. v. Newman, 378 S.E.2d 487 (Ga. Ct. App. 1989). The plaintiff suffered injuries from the off-label use of a product to prevent miscarriage. *See id.* at 488. The court held that the manufacturer could be liable if the off-label use of the product to prevent miscarriages was foreseeable. *See id.* at 489; *see also* Richards v. Upjohn Co., 625 P.2d 1192 (N.M. Ct. App. 1980). The plaintiff suffered from the off-label use of an antibiotic to irrigate a wound post-operatively. *See id.* at 1194. The use had previously been in the product's FDA-approved labeling; however, the manufacturer withdrew this use and no longer recommended the product for this use. *See id.* The court held that the manufacturer had a duty to warn of adverse events associated with the use of its product to irrigate wounds after surgery, if that use was foreseeable. *See id.* at 1195-97.

111. 159 F.3d 817, 818 (3d. Cir. 1998).

112. *See id.* at 819.

113. *See id.* at 820.

114. This case dealt with the approval of medical devices, which are approved under a different regulatory framework from drugs, but the process is similar enough that a similar set of facts associated with a drug manufacturer could be considered analogous.

115. *See Orthopedic Bone Screw Prods.*, 159 F.3d at 820.

116. *Id.* at 829.

B. Lanham Act

Pharmaceutical companies will also need to consider potential attacks from competitors under the Lanham Act before disseminating off-label information. The Lanham Act provides a private cause of action for unfair competition resulting from false advertising, including false scientific establishment claims.[117]

The Lanham Act was passed in 1946, but was not extended to address false advertising about a competitor's product until 1954 when the Third Circuit decided *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*[118] In the case, L'Aiglon Apparel alleged that the defendant had wrongfully used a picture of the plaintiff's dress in a national advertising campaign.[119] The plaintiff did not allege that the picture was used to mislead consumers into thinking that the dress being sold was manufactured by the plaintiff—a so-called "palming off" claim.[120] Rather, the plaintiff alleged that the defendant was misleading consumers by insinuating that they could receive a similar dress for less money.[121] However, even after *L'Aiglon Apparel*, other jurisdictions continued to limit the Act by disallowing similar claims; only misrepresentations made about one's own product were covered.[122] Thus, the Act effectively protected consumers more than competitors. Congress finally spoke in 1988, expressly rejecting precedent contrary to *L'Aiglon Apparel* and indicating that the Lanham Act was intended to protect both consumers and competitors. Misrepresentations about a competitor's product, as well as the manufacturer's own product, are now actionable under the Act.[123]

Currently, a Lanham Act false advertisement claim requires five essential elements. First, the plaintiff must show that the defendant made "false or misleading statements."[124] This includes false statements about scientific data. Second, the plaintiff must show "there is actual deception or at least a tendency

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117. *See* 15 U.S.C.A. § 1125(a) (1999). In early Lanham Act cases, courts limited the Act to "palming-off" claims. These were misrepresentations made by manufacturers that their product originated from another source. *See* Chamberlain v. Columbia Pictures Corp., 186 F.2d 923, 925 (9th Cir. 1951); Charles J. Walsh & Marc S. Klein, *From Dog Food to Prescription Drug Advertising: Litigating False Scientific Establishment Claims Under the Lanham Act*, 22 SETON HALL L. REV. 389, 409 (1992). Establishment claims entered Lanham Act jurisprudence in 1986 in *Thompson Medical Co. v. Ciba-Geigy Corp.*, 643 F. Supp. 1190 (S.D.N.Y. 1986). *See* Walsh & Klein, *supra*, at 419.

118. 214 F.2d 649 (3d Cir. 1954).

119. *See id.* at 650.

120. *See* discussion *supra* note 116.

121. *See L'Aiglon Apparel*, 214 F.2d at 650.

122. *See* Bernard Food Indus., Inc. v. Dietene Co., 415 F.2d 1279 (7th Cir. 1969).

123. *See* Walsh & Klein, *supra* note 116, at 409-11.

124. United States Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 922 (3d Cir. 1990) (quoting Max Daetwyler Corp. v. Input Graphics, Inc., 545 F. Supp. 165, 171 (E.D. Pa. 1982)).

to deceive a substantial portion of the intended audience."[125] Third, the plaintiff must demonstrate that "the deception is material in that it is likely to influence purchasing decisions."[126] Fourth, for jurisdictional purposes, the goods being advertised must travel in interstate commerce.[127] Lastly, the plaintiff must demonstrate the "likelihood of injury to the plaintiff in terms of declining sales, loss of good will, etc."[128] Injunctive relief is the usual remedy granted, but in some cases corrective advertising is granted.[129]

Many of the Lanham Act cases associated with pharmaceutical products involve establishment claims. An establishment claim represents that scientific data or other information exists to support the truth of the statement.[130] Common fact patterns in Lanham Act cases include the following: (a) no "real" science, (b) distortion of science, (c) old science that is no longer relevant, (d) unreliable science, and (e) good science, but the data does not support the statement.[131] Many courts have adopted FDA standards in evaluating scientific data.[132]

A recent Lanham Act decision involving pharmaceutical products is *Zeneca Inc. v. Eli Lilly and Co.*[133] In this case, the plaintiffs alleged that Lilly was making false promotional claims about one of its products, raloxifene hydrochloride (Evista®).[134] At that time, Evista® had been approved by the FDA for the prevention of osteoporosis in postmenopausal women.[135] The plaintiffs' products were FDA-approved for the treatment of advanced breast cancer.[136] The plaintiffs accused Lilly of claiming that Evista® (1) had been proven to reduce the risk of breast cancer, (2) was comparable or superior to tamoxifen citrate for the prevention of breast cancer and (3) had been approved by the FDA for prevention of breast cancer.[137] Lilly argued that it never made the latter two claims and that the first claim was not false, based on the results of a clinical trial known as the MORE study, the results of which were published in the *Journal*

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125. *Id.*

126. *Id.*

127. *See id.*

128. *Id.* at 922-23.

129. *See* Walsh & Klein, *supra* note 116, at 416-18.

130. *See* William 1. Rothbard, *Challenging False Advertising by Competitors*, 775 PLI/COMM. 23, 29 (1997).

131. *See* Walsh & Klein, *supra* note 116, at 423-28.

132. *See id.* at 429. The FDA uses the substantial evidence test for safety and efficacy of a drug. This includes data from well-controlled clinical investigations, conducted by qualified experts with the training and experience needed to assess the safety and efficacy of the drug. *See* 21 C.F.R. § 202.1(e)(4)(ii)(b) (2000). The FDA will also allow claims "[f]or which there exists substantial clinical experience." 21 C.F.R. § 202.1(e)(4)(ii)(c).

133. No. 99-Civ.-1452(JGK), 1999 WL 509471 (S.D.N.Y. July 19, 1999).

134. *See id.* at *1.

135. *See id.*

136. *See id.*

137. *See id.*

of the American Medical Association (*JAMA*).[138] The court disagreed, holding that Lilly had made the first two claims and granting plaintiffs injunctive relief.[139]

A key factor in the decision was the MORE study.[140] Certain results of the MORE study were published in the June 16, 1999 issue of *JAMA*. The authors concluded that "a median of [forty] months of treatment with raloxifene decreases the risk of newly diagnosed breast cancer in post-menopausal women who have osteoporosis and who have no prior history of breast cancer."[141] While the court found the results of the study promising, it did not think Lilly demonstrated that Evista® reduced the risk of breast cancer.[142] In making its decision, the court relied heavily on correspondence between the FDA and Lilly that suggested the MORE study could not, by itself, support an indication for the prevention of breast cancer.[143] However, the FDA rarely approves new products or new indications based solely on the results of one study. Further, the FDA allowed Lilly to add information about the results of the MORE study to the Evista® package insert, with the caveat that the following statement also be added: "the effectiveness of raloxifene in reducing the risk of breast cancer has not yet been established."[144]

This decision produces uncertainty for pharmaceutical manufacturers wishing to disseminate off-label information without fear of a Lanham Act claim. Importantly, the court in this case found actual promotion, as opposed to dissemination, which is not protected by the WLF cases. This decision would seem to suggest that manufacturers have to be very careful that dissemination of off-label information does not turn into promotion. However, the line between promotion and dissemination can be blurry, and courts and the FDA may interpret the terms differently. This decision is disconcerting to proponents of free dissemination of off-label information because it implies that without FDA approval of information a manufacturer may be subjecting itself to the risk of a Lanham Act claim.

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138. *See id.* at *26.

139. *See id.* at *43.

140. *See* Steven R. Cummings et al., *The Effect of Raloxifene on Risk of Breast Cancer in Postmenopausal Women*, 281 JAMA 2189 (1999). MORE is an acronym for Multiple Outcomes of Raloxifene Evaluation and was Lilly's registration clinical trial for the indication of treatment of osteoporosis in postmenopausal women. *See id.* at 2189. The MORE trial studied the effects of raloxifene on the risk of breast cancer as a secondary endpoint. *See id.* at 2190. The osteoporosis results were published in the August 18, 1999 issue of *JAMA*. *See* Bruce Ettinger et al., *Reduction of Vertebral Fracture Risk in Postmenopausal Women with Osteoporosis Treated with Raloxifene*, 282 JAMA 637 (1999).

141. Cummings et al., *supra* note 140, at 2196.

142. *See* Zeneca Inc. v. Eli Lilly and Co., No. 99-Civ.-1452(JGK), 1999 WL 509471, at *43 (S.D.N.Y. July 19, 1999).

143. *See id.* at *18–22.

144. *Id.* at *27.

C. The Pharmaceutical Marketplace

Perhaps the strongest incentive for pharmaceutical manufacturers to think twice before providing off-label information about their product is the pharmaceutical marketplace itself.[145] Empirical data suggest that detailing, the interaction between the prescriber and a sales representative, has a direct effect on sales.[146] Additionally, an increasing number of sales representatives are vying for a physician's limited time,[147] with an increasing number of competitive products in the marketplace.[148] Intuitively, this leads to less time available for sales representatives to convince physicians to prescribe their products.

These time restrictions increase the need for sales representatives to share credible information with physicians. If a physician does not feel that the sales representative is sharing credible information, then he or she may refuse to see the representative, thus severing one of the pharmaceutical company's primary means of impacting market share. Consequently, a manufacturer will have incentives to ensure that their sales representatives do not promote from or overstate the significance of the scientific off-label information that is being shared. The physician can also choose to report false claims to the regulatory authorities if the representative is inappropriately characterizing the data. Additionally, because reputation and public perception play such a key role in the economic success of pharmaceutical companies, negative publicity associated with sharing false and/or misleading information will likely have an adverse effect on an individual company's financial success.[149]

V. PROTECTIONS DO EXIST IF UNCERTAINTIES ARE RESOLVED

The framework established in WLF I coupled with product liability law, the Lanham Act, and the pharmaceutical marketplace could provide adequate protection for society, while at the same time allowing the important dissemination of off-label information about pharmaceutical products. However, manufacturers may not take full advantage of the WLF framework until the uncertainties that exist in current product liability law, the Lanham Act and the court of appeals' decision in *Washington Legal Foundation v. Henney* are resolved.

A. Product Liability

Two key uncertainties remain under current product liability law, primarily stemming from inconsistent treatment of the topic by the various jurisdictions.

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145. *See* Winchester, *supra* note 100, at 645.

146. *See* John A. Rizzo, *Advertising and Competition in the Ethical Pharmaceutical Industry: The Case of Antihypertensive Drugs*, 42 J.L. & ECON. 89, 107 (1999).

147. *See* Larry Gabe & Michele Goldberg, *Employment Outlook '99: Still an Employee's Market*, PHARM. EXECUTIVE, Apr. 1, 1999, at 59, 1999 WL 11913794.

148. *See* Rizzo, *supra* note 146, at 107.

149. *See* Winchester, *supra* note 100, at 645.

The first is the distinction that some courts make between claims involving on-label and off-label use and the related status of an "FDA Defense."[150] The second is the ruling in *Orthopedic Bone Screw Products* that creates a potential cause of action for "fraud on the FDA," as discussed above.[151]

Congress could best address these inconsistencies by enacting a federal statute that includes some form of the FDA Defense.[152] In 1995, a product liability bill was passed by the House of Representatives that contained an FDA Defense provision.[153] In the bill, punitive damages would not be awarded against a manufacturer if the product involved was "subject to premarket approval by the Food and Drug Administration . . . and such drug was approved by the Food and Drug Administration."[154] Punitive damages would also be barred if "the drug is generally recognized as safe and effective pursuant to conditions established by the Food and Drug Administration and applicable regulations, including packaging and labeling regulations."[155] Unfortunately, the House bill was not enacted into law, but the provisions contained therein represent a viable starting point. This defense would give pharmaceutical companies a significant incentive to conduct the additional studies needed to seek FDA approval for additional uses of their drugs, alleviating one of the FDA's main concerns about the WLF I and II decisions. Such a law would additionally create more certainty for manufacturers because it would negate the current, confusing distinctions across jurisdictions. In this new law, Congress could also outline how the courts should address the distinction between product liability cases involving on-label and off-label uses.

Utilization of the framework established in the Restatement (Third) of Torts dealing with failure to warn might be appropriate. Pharmaceutical companies should be required to provide physicians with enough information about the known benefits and risks of their products for the physician to make an informed decision. One proposal would be to create a duty to warn physicians of known potential adverse effects associated with off-label use for manufacturers that choose to disseminate off-label information related to that use. While it is not reasonable to hold a manufacturer responsible merely because its product is being prescribed for off-label use, it is reasonable to hold a manufacturer liable for not warning of known adverse effects associated with uses for which it actively disseminates information. The Restatement approach would both allow companies to utilize the WLF framework and could help alleviate concerns that these companies will not provide information on both the risks and benefits of the use of their products in unapproved indications.

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150. *See supra* note 101-10 and accompanying text.

151. *See supra* notes 111-16 and accompanying text.

152. The FDA Defense was proposed in two separate bills in 1995, each containing provisions for FDA approval limiting the liability of pharmaceutical manufacturers in product liability cases. *See* Marthaler, *supra* note 99, at 472.

153. *See* H.R. 956, 104th Cong., § 201(f) (1995).

154. H.R. 956, 104th Cong., § 201(f)(1)(A)(i) (1995).

155. H.R. 956, 104th Cong., § 201(f)(1)(A)(ii) (1995).

Even if Congress took the above actions, however, the *Orthopedic Bone Screw Products* ruling might still be of concern. While likely distinguishable, this case seems to stand for the proposition that a cause of action exists when companies pursue regulatory approval for one use of their products and then disseminate information on another unapproved use. Admittedly, this case involved devices instead of pharmaceuticals, but the reasoning by the court could easily apply to both. Moreover, the company tried to pursue an indication for the unapproved use at issue and their data were rejected by the FDA. Typically, manufacturers will be disseminating cutting-edge data that have not yet been reviewed by the FDA. Nevertheless, in order for companies to disseminate off-label information without fear of similar lawsuits, this holding would need to be overruled.

B. Lanham Act

The most recent pharmaceutical Lanham Act case, *Zeneca, Inc. v. Eli Lilly and Co.*,[156] presents another possible barrier to a less-restricted exchange of off-label information. The case suggests that even though data was published in a peer-reviewed journal, off-label information could still be considered false and misleading under the Lanham Act criteria. Importantly, the court in this case found promotion and not just dissemination, but the line between the two can be blurry. As a result, manufacturers must ensure that dissemination efforts do not rise to the level of promotion. Additionally, manufacturers' compliance with the WLF I framework may not preclude a Lanham Act claim.

Dissemination of scientific data published in a peer-reviewed journal should not be deemed false and misleading simply because the FDA does not consider it sufficient evidence to determine an indication for a use. The FDA only on very rare occasions will approve new products or new uses based on a single study. If this case implies that a manufacturer cannot disseminate scientific information unless it has the kind of "substantial evidence" required for FDA-approval of that use, then the rights granted under WLF I and II have little value to physicians, their patients or manufacturers. Clearly, clinical trial data can be presented out of context or misconstrued, but if a study is published in a peer-reviewed journal, the data in that article should not, by definition, be considered false. Courts should, of course, apply the Lanham Act when manufacturers misrepresent good science or try to utilize old science that is no longer relevant, but should not construe "false and misleading" as equivalent to not meeting the evidentiary standard utilized by the FDA.

C. Washington Legal Foundation Cases

The lack of clarity provided by the appellate court will lead to cautious utilization of WLF I framework by pharmaceutical manufacturers. Companies will have concerns about the FDA's response to manufacturers embracing the new framework and ignoring the guidelines established by the agency (and

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156. No. 99-Civ.-1452 (JGK), 1999 WL 509471 (S.D.N.Y. July 19, 1999).

FDAMA). These concerns include fear of retaliation by the agency[156] and enforcement actions for misbranding.[157] Importantly, the FDA continues to view "off-label" dissemination as inconsistent with its goals of inducing manufacturers to submit new evidence of effectiveness for supplemental labeling.[158]

A higher court reaching the merits of the First Amendment issue in the current case could best address the lack of clarity in this area. A court could also resolve the issue if the FDA brings an enforcement action against a pharmaceutical manufacturer and the company challenges the constitutionality of the FDA's action. The U.S. Court of Appeals in *Washington Legal Foundation v. Henney* did question whether the FDA could use evidence of off-label dissemination as grounds for an enforcement action without violating the First Amendment.[159] The previous opinions by the District Court for the District of Columbia suggest a pharmaceutical manufacturer could prevail with a First Amendment argument.[160] While both steps provide some clarity on the issue, manufacturers likely will be reluctant to go to battle with the FDA for the reasons discussed above.

Another possibility would be for Congress to amend the FDCA to comport with the framework established by WLF I. This would likely mean amending the provisions of the FDCA and FDAMA that are in conflict with a free exchange of scientific data between healthcare professionals and manufacturers. This approach would seem to be beneficial for both the FDA and manufacturers. It would prevent the FDA from retreating on the agency's long-held aversion toward off-label dissemination. Moreover, it would allow manufacturers to receive the benefits of off-label dissemination without fear of an enforcement action or retaliation by the agency.

CONCLUSION

WLF I and II have increased the ability of pharmaceutical manufacturers to disseminate off-label information about their products. To some this means that healthcare professionals will receive the latest, most innovative information available about the products they prescribe and be better equipped to treat suffering patients. To others this spells disaster and puts patients and the companies themselves at risk.

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156. *See* Jeff Swiatek, *Off-label Ruling Opens Door for Lilly; Drugmaker's Sales Reps Can Offer Doctors Articles That Describe Other Uses for Products*, INDPLS. STAR, July 30, 1999, at C1.

157. *See* discussion *supra* note 46.

158. *See* discussion *supra* notes 27-35 and accompanying text.

159. A manufacturer "may still argue that the FDA's use of a manufacturer's promotion of off-label uses as evidence in a particular enforcement action violates the First Amendment." Washington Legal Found. v. Henney, 202 F.3d 331, 336 n.6 (D.C. Cir. 2000).

160. *See* Washington Legal Found. v. Friedman, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dismissed, vacated in part*, 202 F.3d 331 (D.C. Cir. 2000); Washington Legal Found. v. Henney, 56 F. Supp. 2d 81 (D.D.C. 1999), *appeal dismissed, vacated in part*, 202 F.3d 331 (D.C. Cir. 2000); Washington Legal Found. v. Henney, No. 94-1306 (D.D.C. Nov. 30, 2000).

The framework established in WLF I, coupled with product liability law, the Lanham Act, and the pressures of the pharmaceutical marketplace can allow pharmaceutical companies to disseminate off-label information, while still leaving tools available to ensure that the information being disseminated is not misleading. However, uncertainties still remain and need to be addressed. Product liability law relating to pharmaceuticals is inconsistent across the country, recent Lanham Act decisions appear to conflict with the principles of the WLF cases, and the remaining effect of the WLF cases remains uncertain.

Nevertheless, solutions do exist. Congress and the courts could take steps to resolve these issues and ensure that important information on off-label uses of life-saving pharmaceuticals is readily available to physicians and that adequate protections are in place to protect society from over-zealous marketing activities.

POLICING THE SELF-HELP LEGAL MARKET: CONSUMER PROTECTION OR PROTECTION OF THE LEGAL CARTEL?

JULEE C. FISCHER*

INTRODUCTION

The emergence of information technology in the legal field is spearheading new approaches to the practice of law, but the legal community is questioning whether the new technology may be a double-edged sword. The Information Revolution is reshaping traditional lawyer functions, forcing innovations in everything from research and document management to marketing and client communications. Yet, just as technology drives change inside law firms, consumers too are seizing the knowledge that is increasingly at their fingertips.

The market is flourishing for self-help legal counsel. An increasing array of Internet Web sites often dispense legal advice and information free of charge. This advice ranges from estate planning and contract issues to custody battles and torts. Further, the legal industry is witness to the advent of do-it-yourself legal software packages marketed directly to consumers. Innovative? Yes. Easier? Certainly. But to what extent is this a blessing or a curse, both to lawyers and consumers?[1]

Self-help law can be defined as "any activity by a person in pursuit of a legal goal or the completion of a legal task that [does not] involve legal advice or representation by a lawyer."[2] Consumers participating in the self-help market are typically driven by factors such as relative cost, self-reliance, necessity, and distrust of lawyers.[3] Clearly, such products offer the public up-front benefits of convenience and availability. Nevertheless, larger issues arise concerning who is responsible for the advice and whether it is dispensed by lawyers. Moreover, because rules for professional responsibility vary from state to state, a lawyer giving advice via the Internet across state lines may be violating local rules of marketing and solicitation.

Further uncertainties concern attorneys who field questions from users in states where that attorney is not licensed, as well as non-attorneys acting on behalf of companies that provide legal advice. These acts could violate rules prohibiting the unauthorized practice of law. In addition, when, if at all, is an

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1. "At the dawn of the Renaissance, Europe was so excited by the arrival of sailing ships with exotic goods from the Orient that no one noticed that the ships carried rats, fleas, and the Black Death." James Johnston, *Is E-Law a Blessing or a Curse for Practitioners?*, TEX. LAW., Nov. 9, 1998, at 36. This article also states that lawyers may be so "eager to embrace the Internet that they do not see the impending threat to their livelihood." *Id.*

2. Steve Elias & Catherine Jermany-Elias, *Self-Help Law: What It Is and Why It's Safe*, *at* http://www.nolo.com/Texas/selfhelp.html (last visited July 31, 2000) (on file with the author).

3. *See id.*

attorney-client relationship created?[4] Whether the bar associations or some other regulatory bodies are best situated to govern these questions is undetermined. Will consumer interests be adequately protected, or are their interests best served by *caveat emptor* and the ideals of free enterprise? The common theme underlying these queries is whether the legal community truly seeks to protect consumers or its own cartel in an effort to preserve its monopoly.

To address these issues, Part I of this Note will first touch on the evolution of the self-help legal market and the corresponding implications within our modern legal framework. The discussion will address the legal community's reaction to self-help via heightened enforcement of regulations against the unauthorized practice of law, both by non-lawyers providing legal advice through software or the Internet, and lawyers counseling clients in jurisdictions where they are unlicensed.[5] This section will then consider how technology is blurring state lines. First, it examines the issue of jurisdiction and the confusion caused by evolving technology. Second, the discussion turns to how the Internet can increase attorneys' risk of violating rules against advertising and solicitation in various jurisdictions. Finally, this section addresses the leading cases to date concerning self-help and the unauthorized practice of law.

Part II of this Note will address the public policy issues that frame the debate over regulation of the practice of self-help law. The discussion will focus on consumer protection, including the arguments for and against increased regulation, and consider the legal industry's monopoly over the allowable practice of law and whether the merits of this longstanding system justify its continuation. This analysis will question whether the legal monopoly exists to truly protect consumers, or if this premise underestimates the intelligence of people to make sound decisions regarding legal counsel. The section will also consider the lack of access to affordable legal counsel in the United States and the extent to which self-help can rectify this policy concern.

Finally, Part III will address the various solutions to the perplexities posed by self-help law. First, it will evaluate the feasibility of regulation and whether the American Bar Association (ABA) is best situated to make these decisions. Then, it will discuss the use of disclaimers and whether they provide sufficient

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4. Analysis of modern case law reveals that on-line exchanges resulting in specific legal advice will likely be viewed as creating attorney-client relationships. This triggers traditional duties among lawyers including confidentiality, competence, and loyalty. For an excellent treatment of this topic, see Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147 (1999).

5. A relevant issue, though beyond the scope of this Note, is the extent to which Internet access providers can be held liable for transmissions facilitated through their networks that amount to unauthorized legal practice. *See generally* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991) (holding that an on-line news distributor is a passive receptacle for information and will not be held liable in absence of actual knowledge, where a special interest forum carried false and defamatory statements); *cf.* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (holding that an on-line provider exercised sufficient editorial control over its computer bulletin boards to incur liability as a publisher).

protection for consumers. Part III will also consider possible solutions that attempt to strike a balance between consumer interests and the legal industry.

I. THE SELF-HELP LEGAL MARKET AND THE MODERN FRAMEWORK

The explosion of information technology is growing faster than it can be regulated. Technology has outpaced the states' capacity to develop rules for providing legal services electronically.[6] In spite of this regulatory lapse, a viable and growing market of self-help legal products has emerged. For consumers, it seems that the benefits of self-help, namely convenience and affordability, outweigh the potential costs of creating ineffective legal instruments. The demand for self-help legal products has steadily increased, and the legal community is not turning a blind eye to this phenomenon.

Without a doubt, computer technology and the Information Revolution are setting the economic stage for lawyers in the new millennium. The Internet has redefined the parameters of business and society in general. An estimated thirty-five million households, comprising over ninety-seven million people, have Internet access in the United States—a forty-three percent increase between 1998 and 1999.[7] As of early 2000, the number of Internet users surpassed 170 million.[8] In fact, the number of Internet users worldwide is expected to reach an estimated 320 million by 2001 and 720 million by 2006.[9]

The modern electronic landscape is growing not just in size, but scope. Today's consumers turn to the Internet to secure medical diagnoses[10] and prescription medications,[11] to transact business,[12] to perform stock trades (with or without brokers), or even to secure a mortgage.[13] Indeed, software and Internet services are eroding the territory that was once the exclusive domain of many professionals, including physicians, accountants, bankers, and brokers.[14]

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6. *See* Wendy R. Liebowitz, *Lawyers, $15.95 a Box*, NAT'L L.J., Feb. 22, 1999, at A18.

7. *See* Alan R. Nye, *Ten Things Maine Lawyers Should Know About the Internet*, 14 ME. B.J. 196, 196 (1999).

8. *See* Max Baucus, *International Trade Aspects of E-Commerce*, 17 ARIZ. J. INT'L & COMP. L. 205, 206 (2000).

9. *See* Shahram A. Shayesteh, *High-Speed Chase on the Information Superhighway: The Evolution of Criminal Liability for Internet Piracy*, 33 LOY. L.A. L. REV. 183, 183 (1999).

10. *See, e.g.*, Jamie Talan, *On the Net, Be Wary of What Dr. Orders*, NEWSDAY, Oct. 21, 1998, at A19 (warning that physicians must be wary of whether advice given via the Internet may run afoul of regulations for informed-patient consent).

11. *See* Greg Miller, *A Turf War of Professionals vs. Software*, L.A. TIMES, Oct. 21, 1998, at A1.

12. *See* Jonathan D. Bick, *Why Should the Internet Be Any Different?* 19 PACE L. REV. 41, 44-45 (1998). The validity of contracts created via the Internet continues to be analyzed, particularly with respect to which laws, and whose laws, are applicable. *See id.*

13. *See* Miller, *supra* note 11, at A1.

14. *See id.*

For lawyers, the story is no different. A flourishing legal software market offers a myriad of products that generate legal instruments, including wills, residential leases, articles of incorporation and contractual agreements.[15] In addition, an increasing number of consumers are turning to the Internet for legal counsel instead of calling their lawyers.[16] Popular Web sites dispense legal advice and documents at little or no cost.[17] According to one commentator, "[s]ince Shakespeare, people have looked for ways to do away with their lawyers. Now, the Internet may do the trick."[18]

Internet sites such as FreeAdvice.com and LawGuru offer free consultation to help consumers assess their rights.[19] Further, the site for FindLaw.com has an on-line library equivalent to major law schools. Lectlaw.com offers legal advice on "practically every imaginable legal topic," including numerous legal documents that can be downloaded for free or at a minimal cost.[20] These sites, which encourage laypeople to post legal questions and state of residence, suggest that lawyers who are licensed in those states post responses.[21]

A more direct approach is taken by Nolo.com, whose Web site displays an advice columnist who will "tell you what to do about your legal woes and how to do it—in language you can understand."[22] At Nolo.com, users can also download basic legal documents (such as wills) and complaint letter forms on various topics.[23] For example, one form letter regarding sexual harassment in schools informs school officials that their failure to act may violate a recent Supreme Court decision.[24] Soon, "*Nolo.com* will offer scores of legal documents you can customize on your home PC for a modest fee. Someday, users may be

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15. *See* Nye, *supra* note 7, at 197.

16. *See* Miller, *supra* note 11, at A1.

17. For examples of Internet-based advice and forms for wills, trusts and related documents, see Dennis Toman, *The Estate Planning Links Website*, *at* http://www.estateplanninglinks.com (last visited Aug. 22, 2000) (on file with author) and R. Daniel Brady, *Memorandum to Our Clients and Friends About Estate and Gift Taxes*, *at* http://www.danbrady.com/concepts.htm (last visited Aug. 22, 2000) (on file with author). For an example of a site related to family law issues, see Michael J. Duncan, *Law Office of Michael J. Duncan*, *at* http://www.bristlecone.com/mduncan/familylaw.htm (last visited July 31, 2000) (on file with author).

18. Richard B. Schmitt, *More People Consult the Firm of Cyber, Web & Dot-com*, WALL ST. J., Aug. 2, 1999, at B1.

19. *See id.* Most of these Web sites are for-profit and funded through paid advertisements, such as for expert witnesses.

20. Nye, *supra* note 7, at 197.

21. *See* Lanctot, *supra* note 4, at 152.

22. Schmitt, *supra* note 18, at B1. For an example of a question-answer session on Nolo.com, a consumer asked about the validity of a prenuptial agreement signed within forty-eight hours of a wedding. Answer: "You can relax and enjoy your newly wedded bliss. . . . Generally, prenuptial agreements are legal if both parties are fully informed about the underlying facts of the agreement and what it means." *Id.*

23. *See id.*

24. *See id.* at B4.

even be able to file such documents in court electronically."[25] Nolo.com's predecessor, Nolo Press, launched the self-help law movement in the 1970s with books instructing people how to file for bankruptcy protection.[26] According to Ralph Warner, founder of Nolo.com, "[w]e have done cars . . . insurance . . . [and] investments. Why not law?"[27]

Consumers' demand for self-help legal products is understandable considering that free advice and low-cost legal documents are an attractive alternative to high-priced attorneys. With self-help there is "no need to make an appointment with a lawyer, take time off work, fight traffic or pay high legal fees."[28] In essence, the technological revolution is "democratizing the practice of law."[29] Consumers can service their legal needs from the comfort of their homes by creating legal documents with mass-marketed computer software or by tapping into the Internet for real-time question and answer sessions on legal Web sites.

Consider the success of the personal tax software "Turbotax." Turbotax revolutionized the business of tax preparation by marketing a CD-ROM with the tax expertise comparable to an accountant, but at a considerably lower price.[30] Turbotax is interactive; it interviews the user as a CPA might and uses the responses to prepare the tax return.[31] Another example of self-help software is "WillMaker." It functions like a lawyer by asking questions and using the answers to "tailor a will for the client by selecting and modifying standard clauses" according to user responses.[32]

In addition to personal software products, interactive documents are available on-line from such federal agencies as the U.S. Trademark Office and the Federal Communications Commission that offer immediate application forms on their sites.[33] These products demonstrate how professional services can be turned into commodities. Consumers are likely to spend at least $10 million each year on self-help legal software alone.[34] Perhaps more poignant, an increasing number of consumers are relying on these products as the answer to their legal needs.

A. The Evolution of the Self-Help Legal Market

Technology has catapulted the self-help legal market, but it is not solely responsible for its creation. In fact, the tradition of Layman's Law dates back to

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25. *Id.* at B1.
26. *See id.*
27. *Id.*
28. Nye, *supra* note 7, at 197.
29. Schmitt, *supra* note 18, at B1 (quoting Ralph Warner, founder of Nolo.com).
30. *See* Johnston, *supra* note 1, at 36 (Turbotax is produced by Intuit Corporation).
31. *See id.*
32. *Id.*
33. *See id.*
34. *See* Miller, *supra* note 11, at A1.

colonial times.[35] As early as the Eighteenth Century, John Wells published *Every Man His Own Lawyer*.[36] This book offered a "complete guide in all matters of law and business negotiations for every State of the Union. With legal forms for drawing the necessary papers, and full instructions for proceeding, without legal assistance, in suits and business transactions of every description."[37] The public demand for this book was evident from the introduction to the 100th Anniversary Edition, which states that the original was "received with great favor, attaining a larger scale, it is believed, than any work published within its time."[38]

The self-help legal market has grown and evolved through the years. Today, many bookstores devote entire sections to the topic, including books on wills, living trusts, default divorces, stepparent adoptions, name changes, simple Chapter 7 bankruptcies, and business contracts, as well as patent, trademark and copyright transactions.[39] Moreover, self-help legal products are steadily emerging and improving.[40] Computer-assisted filings of negotiable instruments and government applications and filings are clearly feasible.[41] Despite the potential liabilities, electronic bulletin boards for the exchange of legal information "are spreading like wildfire throughout the on-line world."[42]

Significant challenges to the legal profession will arise as additional services traditionally provided by attorneys are instead conveniently provided in consumers' homes by non-lawyers.[43] According to one legal commentator, "[t]he cost of legal services and diminished public opinion toward lawyers . . . while not exclusive causes, will contribute to this trend."[44] Whether this bodes well for e-consumers logically depends upon the quality and accountability of these legal services.[45] The primary vehicle for upholding professional standards is

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35. *See* Mort Rieber, *300 Years of Self-Help Law Books*, *at* http://www.nolo.com/Texas/History.html (last visited July 31, 2000) (on file with author) (citing Eldon Revare James, *A List of Legal Treatises Printed in the British Colonies and the American States Before 1801* ("All of the books within this period . . . were for the use of laymen.")).

36. *See id.*; *see also* JOHN G. WELLS, EVERY MAN HIS OWN LAWYER AND BUSINESS FORM BOOK (R. Macoy ed., New York 1880).

37. Rieber, *supra* note 35 (quoting John G. Wells).

38. *Self-Help Law Books and Software: Why the First Amendment Protects Your Right to Use Them*, *at* http://www.nolo.com/Texas/rights.html (last visited Aug. 25, 2000) (on file with author) [hereinafter *Self-Help Law Books and Software*].

39. *See id.*

40. *See id.*

41. *See* Schmitt, *supra* note 18, at B1.

42. Rosalind Resnick, *A Shingle in Cyberspace: Lawyers Online Find Clients—And Some Risks*, NAT'L L.J., Sept. 27, 1993, at 1.

43. *See* Joe Crostwait, *Landscape of Law to Change with Evolving Technology*, J. REC., Jan. 8, 1998, at 2.

44. *Id.*

45. For example, assume a consumer uses a software package to produce a landlord-tenant agreement for a small rental unit she owns. If the agreement is never called into question, the consumer will likely be pleased that the program saved money and time. However, if the document

regulation of the unauthorized practice of law.

B. Regulating the Unauthorized Practice of Law

Given the advent of modern technology, lawyers can easily communicate virtually anywhere via the Internet. However, it would be logistically impossible for lawyers to be licensed in all of those places. The unauthorized practice of law is of "growing concern to plugged-in lawyers, as automated legal forms blossom on the Internet and as legal questions are posed in chat rooms and on e-mail discussion lists or arrive unsolicited in attorneys' electronic 'in-boxes.'"[46] Practicing the law outside an attorney's jurisdiction is a particular danger in the electronic age, and laws vary greatly.[47] Thus, as a framework for discussion of unauthorized practice within the self-help legal market, this analysis will first briefly address the underlying role that jurisdiction and varying state laws play in the technological realm.

1. The Technological Blurring of State Lines: Jurisdiction.[48]—The

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turns out to be legally flawed to the landlord's detriment, where would she turn for a remedy? Did she assume the risk by purchasing a self-help program? Did she do so with full knowledge? The problem is that very little case law exists to guide consumers before they enter into such transactions.

46. Liebowitz, *supra* note 6, at A18.

47. *See id.* (citing Peter Krakaur, president of San Francisco's Internet Legal Services).

48. Jurisdictional issues are an important component of technology and the practice of law. Traditionally, the propriety of a court's exercise of personal jurisdiction has been determined by 1) whether the person's contacts with the forum state satisfy the requirements of that state's long-arm statute (for jurisdiction over non-residents), and 2) whether the exercise of such jurisdiction would satisfy traditional notions of fair play and substantial justice, as required by the U.S. Constitution. *See generally* John F. Delaney et al., *The Law of the Internet: A Summary of U.S. Internet Caselaw and Legal Developments*, *in* PATENTS, COPYRIGHTS, TRADEMARKS AND LITERARY PROPERTY COURSE HANDBOOK SERIES (Practicing Law Inst., Jan. 1999). *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945). Central to this analysis is the extent to which a person could reasonably anticipate being hailed into a court in a forum state. *See id.*

For recent findings where jurisdiction was proper, see Delaney et al., *supra*, referencing *CompuServe Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (finding that knowing efforts to market a product in other states as sufficient); *Inset Systems v. Instruction Set Inc.*, 937 F. Supp. 161 (D. Conn. 1996) (finding Internet advertising sufficient where defendant purposefully directed site advertising to at least 10,000 connected Internet users on a regular basis); *Heroes, Inc. v. Heroes Foundation*, 958 F. Supp. 1 (D.D.C. 1996) (finding that a Web site operator purposefully availed itself of the privilege of conducting activities in the forum); *Resuscitation Technologies, Inc. v. Continental Health Care Corp.*, No. IP96-1457-C-M/S, 1997 WL 148567 (S.D. Ind. Mar. 24, 1997) (holding that contacts by fax and e-mail sufficient).

For recent dismissals for lack of jurisdiction, see *Transcraft Corp. v. Doonan Trailer Corp.*, No. 97C9943, 1997 U.S. Dist. LEXIS 18687, at *1 (N.D. Ill. Nov. 21, 1997) (holding a Web site was likened to a national advertisement, which would not confer jurisdiction in Illinois, absent a showing that defendant intended it to reach the forum state); *Bensusan Restaurant Corp. v. King*,

expansion of computer technology enhances our ability to communicate and the speed with which we do it. In essence, it knocks down the barriers between persons, states, and even countries. As the U.S. Supreme Court noted, "[t]he Internet is a unique and wholly new medium of worldwide human communication."[49] The Internet, with its global reach, is challenging the widely-held assumption that jurisdiction rightfully belongs where an act took place, physically or geographically.[50] Since the World Wide Web stretches across virtually every jurisdictional boundary, the operation of a Web site in a particular state or country could arguably subject that operator to suit nationwide.[51] A definitive answer has yet to emerge on the appropriate jurisdictional framework for this new medium.[52] For example, certain courts have concluded that the act of posting a web site does not confer personal jurisdiction,[53] unless it is clearly being used to solicit business.[54]

2. State Ethics, Advertising and Solicitation Rules.—In addition to the blurring of jurisdictional lines, the technological tidal wave also obscures the applicability of statutory regulations. The ethical issues associated with attorney Web sites include compliance with state bar restrictions on advertising, avoidance of prohibited solicitations, and preventing the unauthorized practice

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937 F. Supp. 295 (S.D.N.Y. 1996) (holding operation of Web site did not constitute an offer to sell a product in New York; hence, there was no activity directed toward forum).

49. Reno v. ACLU, 521 U.S. 844, 850 (1997) (internal citation omitted).

50. *See* Lorelie S. Masters, *Professionals Online: Advice for Travels on the Information Superhighway*, COMPUTER LAW., Mar. 1999, at 1.

51. *See* Delaney et al., *supra* note 48, at 184.

52. *See id.* Given the expanded accessibility of the Internet, courts must consider the extent to which "electronic contacts" should count in establishing a defendant's contacts with a forum state. Courts have been reasonably uniform in treating three general categories: 1) persons doing business over the Internet in the forum state where they reside or have a principal place of business (where jurisdiction is typically found to be proper), 2) users in the forum state that exchange information with a site from another jurisdiction (where jurisdiction has been determined by the level of interactivity and the commercial nature of the exchange on the Web site), and 3) posting information or advertisements on a Web site that is accessible to users both inside and outside the forum state (where courts have not typically found jurisdiction to be proper). *See id.*

Often, courts have required a showing that the operator or owner of a Web site intentionally pursued contacts with the jurisdiction. *See* Masters, *supra* note 50, at 5. "[S]ome commentators have argued persuasively for law recognizing cyberspace as an independent jurisdiction." *Id.* at n.30 (citing Allan R. Stein, *The Unexceptional Problem of Jurisdiction in Cyberspace*, 32 INT'L LAW 1167, 1171 (1998); David R. Johnson & David G. Post, *The Rise of Law on the Global Network*, *in* BORDERS IN CYBERSPACE 13 (1997)).

53. *See* Masters, *supra* note 50, at 5; *see also* Hearst Corp. v. Goldberger, No. 96-Civ.-3620, 1997 WL 97097, at *1 (S.D.N.Y. Feb. 26, 1997); Bensusan Rest. Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996).

54. *See, e.g.*, CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996); EDIAS Software Int'l v. BASIS Int'l, 947 F. Supp. 413 (D. Ariz. 1996).

of law in states where an attorney is not licensed.[55] While the Internet has become a viable tool for legal services, this same technology collides with state-by-state regulation of the legal profession.[56]

Consider an attorney licensed in a particular state and familiar with that state's statutory regulations pertaining to ethics and client solicitation. In the course of communicating electronically, that attorney may come in contact with numerous individuals from different states, each with different rules governing solicitation. Even though the attorney may comply with rules from his or her state, the same may not be true in other states. Thus, one challenge lies in the spontaneous and anonymous nature of the Internet. The speed of communications may render it impractical to assess the applicable body of law in a state before the lawyer responds, especially if the communication is "real time," as with chat rooms and on-line communication. Further, attorneys may not have knowledge of the domicile of on-line clients, and hence, under whose jurisdiction they are subject.

In general, ethical implications for lawyers fall into six categories: advertising and solicitation, unauthorized practice of law, confidentiality, competence, conflicts of interest, and contact with represented parties.[57] Although the vast majority of states have adopted the ABA's Model Rules of Professional Conduct, many have customized provisions, including greater restraints on direct mail solicitations of potential clients, labeling, use of disclaimers and time delays in delivery of material.[58] "Not only has this resulted in a patchwork of rules, but the practical application of those rules to client development on the Internet is sometimes questionable. No set of state rules governing lawyer advertising and the communication of legal services has been promulgated with an understanding of current technology."[59]

Some states have begun to address this issue through ethics opinions.[60] A handful of state bar opinions have reached varying conclusions about whether providing legal advice on-line creates an attorney-client relationship, but none of these opinions has included a detailed analysis.[61] In addition, scant analysis

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55. *See* John B. Kennedy, *Legal Advertising and Ethics on the World Wide Web*, N.Y. L.J., Jan. 27, 1997, at S1.

56. *See* William E. Hornsby, Jr., *Technology Collides with Regulations*, N.Y. L.J., June 30, 1997, at S4.

57. *See* Dean R. Dietrich, *Venturing Onto the World Wide Web: Ethics Implications for Lawyers*, WIS. LAW., Feb. 1999, at 10.

58. *See* Hornsby, *supra* note 56, at S4.

59. *Id.*

60. *See id.* These opinions (Arizona, Illinois, Iowa, Michigan, New York, Pennsylvania and South Carolina) tend to agree on certain fundamentals: A law firm's Web site amounts to lawyer advertising and, therefore, subjects the attorney to the rules.

61. *See* Lanctot, *supra* note 4, at n.28 (citing State Bar of Ariz. Comm. on Rules of Prof'l Conduct, Op. 97-04 (1997) ("recommending that lawyers should 'probably not' answer questions raised in chat rooms online")); Ill. St. Bar Ass'n, Op. 96-10 (1997) (stating that lawyers participating in chat-groups or on-line services that could involve offering personalized legal advice

exists on whether disclaimers would be effective against a malpractice claim.[62] The ABA has considered whether a new set of model rules should be promulgated to address ethics rules in light of new technology.[63] Though no conclusions have been drawn so far, the ABA recommends that state bar associations critically evaluate their own regulatory policies.[64]

On-line legal practice is challenged by questions of jurisdiction and varying state regulations. These issues no doubt lend confusion to the policing of the self-help legal market. A leading method of keeping a check on this rapidly-evolving market is heightened enforcement of regulations against the unauthorized practice of law.

3. Unauthorized Practice of Law.—The issue of unauthorized legal practice has been thrust into the limelight with the development of the self-help legal market. The ABA has long regulated the unauthorized practice of law, under the auspices of protection of the public interest and welfare.[65] According to ABA Model Rules of Professional Conduct (MRPC), "[a] lawyer shall not (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."[66] The comment to MRPC 5.5 states: "The definition of the practice of law is established by law and varies from one jurisdiction to another. . . . [L]imiting the practice of law to members of the bar protects the public against the rendition of legal services by unqualified persons."[67] Model rules and most statutes today preclude persons not licensed by a state from practicing law in that state.[68]

Whether consumers agree that they need such a high degree of protection is debatable. According to a 1974 ABA survey of the public's legal needs, "[eighty-two percent] of respondents agreed that 'many things that lawyers handle—for example, tax matters or estate planning—can be done as well and less expensively by nonlawyers.'"[69] Some critics view these regulations as methods for lawyers to protect their lucrative privileges from competitors.[70]

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to anyone connected to the service should be mindful that the recipients of such advice are the lawyer's clients, with the benefits and burdens of that relationship).

62. *See* Lanctot, *supra* note 4, at 159-60.

63. *See* AMERICAN BAR ASSOCIATION, CENTER FOR PROFESSIONAL RESPONSIBILITY, ETHICS 2000—COMMISSION ON THE EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT (2000), *available at* http://www.abanet.org/cpr/ethics2k/html (on file with author).

64. *See* Press Release, American Bar Association, ABA Commission Explores Policies for Lawyer Internet Advertising (May 19, 1998) (on file with author).

65. *See* Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 3 (1981).

66. MODEL RULES OF PROF'L CONDUCT R. 5.5 (1995).

67. *Id.* at cmt. 1.

68. *See* AMERICAN BAR ASSOCIATION & BUREAU OF NATIONAL AFFAIRS, LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, § 81:568 (1996) [hereinafter LAWYERS' MANUAL].

69. Rhode, *supra* note 65, at 3.

70. *See* RICHARD L. ABEL, AMERICAN LAWYERS (Oxford Univ. Press 1989).

Moreover, consumers who rely on bad advice from authorized lawyers are often able to pursue a remedy through a malpractice action. They can also seek redress through the bar association to which the lawyers are accountable by filing grievances or pursuing disbarment. However, the same remedies may not be available for the consumer that detrimentally relies on legal advice from self-help sources. Statutes that proscribe the unauthorized practice of law are notoriously vague[71] and have been labeled both conclusory and circular.[72] What protection is afforded to consumers who help themselves?

Although self-help regulation is in its infancy, Texas is one jurisdiction that is paving the road through litigation for unauthorized legal practice by "do-it-yourself" legal publishers. The focus is whether these activities by non-lawyers or lawyers unlicensed in the applicable jurisdiction constitute the practice of law.

In *Unauthorized Practice of Law Committee v. Parsons Technology, Inc.*,[73] a Texas district court enjoined the makers of a consumer software package called "Quicken Family Lawyer" after determining that the product constituted the unauthorized practice of law.[74] The program offered over 100 different legal forms, along with instructions to complete the forms.[75] The package label claims the product is "valid in 49 states including the District of Columbia" and is "developed and reviewed by expert attorneys."[76] Despite the fact that the program contains a disclaimer,[77] the court found that such marketing language "creates an air of reliability about the documents which increases the likelihood that an individual user will be misled into relying on them."[78]

The *Parsons* court relied on two Texas Court of Appeals cases, *Palmer v. Unauthorized Practice of Law Committee*,[79] which held that the sale of consumer forms for wills constituted unlicensed practice, and *Fadia v. Unauthorized Practice of Law Committee*,[80] which held that a manual for "do-it-yourself" wills

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71. *See* William H. Brown, *Legal Software and the Unauthorized Practice of Law*, 36 CAL. W. L. REV. 157, 165 (1999).

72. *See* Rhode, *supra* note 65, at 97.

73. Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., No. CIV.A.3:97 C-2859H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999), *vacated and remanded*, 179 F.3d 956 (5th Cir. 1999).

74. *See id.* at *11.

75. *See id.* at *1.

76. *Id.*

77. *See id.* The disclaimer reads:

> This program provides forms and information about the law. We cannot and do not provide specific information for your exact situation. For example, we can provide a form for a lease, along with information on state law and issues frequently addressed in leases. But we cannot decide that our program's lease is appropriate for you. Because we cannot decide which forms are best for your individual situation, you must use your own judgment and, to the extent you believe appropriate, the assistance of a lawyer.

Id. at *2.

78. *Id.* at *6.

79. 438 S.W.2d 374, 377 (Tex. App. 1969).

80. 830 S.W.2d 162, 166 (Tex. App. 1992).

constituted unauthorized practice, despite defendant's reliance on state court decisions which required some personal relationship between the alleged unauthorized lawyer and the client in order to be deemed the unauthorized practice of law.

Although *Parsons* was factually and procedurally similar to the previous cases, the appellate court was ultimately forced to vacate the district court's decision[81] when the Texas legislature enacted an emergency amendment to the statute on unauthorized practice.[82] In response to pressure from technology industry lobbyists,[83] the amendment provided that the "practice of law does not include the design, creation, publication, distribution, display, or sale . . . [of] computer software, or similar products if [they] clearly and conspicuously state that the products are not a substitute for the advice of an attorney."[84]

Thus, in the eyes of the Texas legislature, an adequate disclaimer will sufficiently protect consumers against the harms of unauthorized legal practice. However, in *dicta*, the *Parsons* court was not so convinced of a disclaimer's prophylactic effects. The district court emphasized that "the disclaimer does not appear anywhere on [Quicken Family Lawyer's] packaging[, nor] on subsequent uses of the program unless the user actively accesses the 'Help' pull-down menu at the top of the screen and then selects 'Disclaimer.'"[85]

There are other instances where the Texas Unauthorized Practice of Law Committee (UPLC) has taken on publishers of self-help legal software. For example, in 1998, the UPLC took issue with Nolo Press, Inc., publisher of "Living Trust Maker" software and the accompanying user's guide.[86] UPLC charged that Nolo's program, which assists users in preparing their own living trusts, constituted the unauthorized practice of law.[87] Living Trust Maker software includes "briefcase icons" designed to tell the user when the situation

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81. *See* Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 179 F.3d 956 (5th Cir. 1999).

82. *See* H.R. 1507, 1999 Leg., 76th Sess (Tex. 1999).

83. The legislative bailout in *Parsons* can be attributed in no small part to lobbying efforts of the technology industry. For a discussion of the legislative developments, see John Council, *Legal Self-Help Publisher Seeks Lawmakers' Help*, TEX. LAW., Feb. 22, 1999, at 1. Senior Judge Barefoot Sanders instructed Parsons Technology that if it had a problem with his ruling to take it to the legislature. They did just that, and it worked. The now-enrolled legislation effectively prevents the Texas UPLC from taking action against self-help legal publishers. *See id.*

84. *Parsons*, 179 F.3d 956. *See* Texas H.R. 1507, 1999 Leg., 76th Sess. (Tex. 1999). Sponsors behind the bill explained their support of the legislation under the auspices of the First Amendment: "They denied the public's right to read about the law either in self-help books or self-help software." Council, *supra* note 83, at 1 (quoting Rep. Steven D. Wolens, the legislator that filed the bill).

85. Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., No. CIV.A.3:97 C-2859H, 1999 WL 47235, at *2 (N.D. Tex. Jan. 22, 1999), *vacated and remanded*, 179 F.3d 956 (5th Cir. 1999).

86. *See In re* Nolo Press, 991 S.W.2d 768 (Tex. 1999). Nolo Press has published a variety of legal self-help materials for nearly thirty years. *See id.*

87. *See id.* at 769.

might be beyond self-help; thus, if this icon appears when consumers use the program, it suggests that they consult a lawyer.[88]

During the investigation, the UPLC asked Nolo to provide the names, addresses and states of licensure of any attorneys who contributed to those products.[89] The company appealed directly to the Texas Supreme Court for a writ of mandamus to block the UPLC's requests for sensitive documents and information.[90] Ultimately, the court denied that it had jurisdiction to issue the writ and compelled Nolo to produce the information requested.[91]

According to Nolo, their target audience was not consumers requiring sophisticated, individualized counsel, but rather the "lowest common denominator" among the population of legal consumers.[92] In fact, the product's money-back guarantee is designed to allow people to return the products if they decide to consult a lawyer.[93] At the time of writing this Note, the UPLC's investigation continues and no formal charges for the unauthorized practice of law have been filed.[94]

Perhaps unsurprisingly, the Texas initiative to enforce unauthorized practice has received criticism from lawyers in Texas and other states. "No [other] state . . . has had the difficulty of understanding the difference between publishing a form book with instructions and information, and meeting with someone and counseling them on the law."[95] However, Mark A. Ticer, attorney for the Texas UPLC, responds that Texas is merely the first state to make such a move.[96] "Implicit legal advice cloaked in the robes of simplicity is very, very dangerous."[97] According to Ticer, "[w]e can either wait until the damage is done [and people get ripped off], or move to prevent damage now."[98]

"All states prohibit the unauthorized practice of law, but Nolo says Texas is the only one that applies its ban to publishers."[99] In addition, Nolo claims that

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88. *See* Janet Elliot, *Who Polices the Practice Police?*, TEX. LAW., Apr. 6, 1998, at 1.

89. *See In re Nolo Press*, 991 S.W.2d at 773.

90. *See id.* at 769.

91. *See id.* at 779.

92. Elliot, *supra* note 88 (quoting Steve Elias, attorney for Nolo Press, Inc.).

93. *See id.*

94. Interestingly, Nolo Press books are mandated by consent decree to be stocked in an Orange County Jail Facility so that inmates may "enjoy their constitutional right of access to the courts." Griffith v. Fontenot, No. CIV.A.1:93C0192, 1994 WL 738984, at *2 (E.D. Tex. Dec. 14, 1994) (citing specific publications including *Legal Research: How to Find and Understand the Law*; *Prisoner's Self-Help Litigation Manual*; *Post Conviction Remedies*; and *Inmate Legal Handbook*).

95. Liebowitz, *supra* note 6, at A18 (quoting Peter D. Kennedy, a commercial litigator who represents Parsons and Nolo).

96. *See id.*

97. Miller, *supra* note 11, at 1 (quoting Mark A. Ticer).

98. Liebowitz, *supra* note 6, at A18.

99. Associated Press, *Publisher Faces Ire of Texas State Bar over Law-Advice Books* (Oct. 19, 1998), *available at* http://www.cnn.com/books/news/9810/19/law.publisher.ap/.

this "system shields lawyers from free competition, subjects the public to higher prices and sacrifices free speech."[100] Attorney Stephen Elias, the company's associate publisher, states, "[I]t frightens us that the lawyers in a state can decide that the people in a state aren't going to get the information they need to do their own law."[101] Nolo enlisted the help of the American Association of Law Libraries, which said "self-help legal materials are necessary to help consumers maneuver through the legal quagmire for many simple, day-to-day issues."[102] Nolo claims that the publication, distribution, and sale of their materials lack the essential element of the practice of law: a client.[103]

Nolo acknowledges that software is no substitute for a legal advocate in the courtroom,[104] and UPLC's charges have been criticized as a "naked attempt to shield the state's lawyers—who charge as much as $400 an hour for such fill-in-the-blanks legal services as drawing up standard wills or simple divorce papers—from off-the-shelf competition."[105] According to one commentator, Nolo's products involve mere "cookie-cutter tasks."[106] However, many attorneys probably focus their entire practices on basic services relating to legal instruments for the end-consumer.

Texas is leading the country in attacking the self-help market, and other jurisdictions are watching with interest and concern. "The Texas ruling raises questions of whether a similar step is possible [in New Jersey] where self-help law books and kits on how to write wills have been available for years."[107] Out-of-state self-help legal publishers fear the UPLC will use the ruling to block the sale of their products within Texas.[108] "The bar may not get far with such unauthorized practice of law arguments if e-law proves popular with the consumer. After all, the primary purpose of regulating the practice of law should be to protect consumers, not lawyers."[109]

4. First Amendment Implications—the Free Speech Argument.—New York took a contrasting stance to regulating the unauthorized practice of law by considering whether banning self-help law books violates the First Amendment to the U.S. Constitution. The leading case on the topic is a 1967 decision from the New York Court of Appeals, *New York County Lawyers Ass'n v. Dacey*,

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100. *Id.*

101. *Id.*

102. *Id.*

103. *See* Nolo Press/Folk Law, Inc. v. Unauthorized Practice of Law Comm., Plaintiffs Petition for Declaratory Judgment, *at* http://ww.nolo.com/texas/petition.html (last visited Nov. 30, 2000) (on file with author).

104. *See* John Greenwald, *A Legal Press in Texas*, TIME, Aug. 3, 1998, at 51.

105. *Id.*

106. *Id.* (quoting Steven Gillers, a New York University law professor).

107. Scott Goldstein, *When Does Software Cross the Line Into Law Practice?*, N.J. LAW., Feb. 9, 1999, at 3.

108. *See* Council, *supra* note 83, at 1 (quoting Casey Dobson, a Texas attorney for a legal publisher).

109. Johnston, *supra* note 1, at 36.

which ruled that the state's attempt to ban the best-selling book entitled "How to Avoid Probate" violated freedom of expression.[110] The *Dacey* court ruled that the practice of law involves the rendering of legal advice and opinions directed to particular clients.[111] According to the court:

> That it is not palatable to a segment of society which conceives it as an encroachment of their special rights hardly justifies banning the book. [It] is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions' (Bridges v. California, 314 U.S. 252, 270[]) . . . . Free and open discussion or even controversy could lead to reforms, if needed, or improvement where desirable. Books purporting to give advice on the law, and books critical of law and legal institutions have been and doubtless will continue to be published. Legal forms are available for purchase at many legal stationary stores. Unless we are to extend a rule of suppression beyond the obscene, the libelous, utterances of or tending to incitement, and matters simply characterized, there is no warrant for the action here taken.[112]

The court conceded that "if the exercise of Dacey's right to freedom of speech by this publication violates reasonable standards erected for the protection of society, or of important interests of society, his right could be subordinated for the common good and the protection of the whole."[113] But in contrast to the modern trend, the *Dacey* court concluded that the book is "not of the kind or quality to provoke disorder. . . . In fact there is no substantive evil imminently threatening the public."[114]

The position taken by the *Dacey* court clearly differs from *Parsons*, which deemed certain self-help products so imminently dangerous as to warrant an injunction. What difference exists between self-help in 1967 versus today? Despite changes in form, consumers and legal needs are arguably similar. The discrepancy may be partly attributable to a change in times. When *Dacey* was decided, the self-help market was not mainstreamed. At that time, Dacey's book was among a few of its kind. Those that purchased it sought it out, rather than having it actively marketed to them. Software and the Internet did not exist then to spontaneously deliver the law to the people. Today, the *Dacey* court may view the issue with greater imminence.

Another distinction is that *Dacey* was decided on the basis of the First Amendment's protection of free speech, which in the modern debate has yet to emerge as the cure-all solution for self-help publishers. Granted, the free speech

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110. 283 N.Y.S.2d 984, 996 (N.Y. App. Div. 1967), *rev'd on the dissenting opinion*, 234 N.E.2d 459 (N.Y. 1967) (finding Norman Dacey, with thirty-five years of experience in estate planning, had no law degree).

111. *Id.* at 1000-01.

112. *Id.*

113. *Id.* at 1000.

114. *Id.*

argument did eventually bail out Parsons Technology in this particular case. Sponsors of the bill in Texas that invalidated the court's ruling in *Parsons* explained that banning self-help products denied the public's right to read about the law either in self-help books or software.[115] However, this policy was advanced by the lobbyists and not the courts. The committee that investigates unauthorized practice is appointed by the Texas Supreme Court, and it will not likely discontinue its mission merely because of this case. Modern proponents of the argument that the First Amendment should apply in the self-help context advocate that "[n]o matter what else the First Amendment stands for, it absolutely stands for the free flow of information."[116]

The extent to which the First Amendment will help legal publishers is unclear. Since *Dacey*, the U.S. Supreme Court has determined that legal advice is entitled to full protection under the First Amendment. In *Board of Trustees, State University of New York v. Fox*,[117] respondents challenged a public university rule that banned persons from dormitories whose motives involved for-profit activities.[118] In overriding the ban, the court noted that such a rule would prevent a student from receiving legal advice in his or her dorm room, which is a form of constitutionally-protected speech.[119] Thus, even though few cases have been decided on this issue, *Dacey* and *Fox* provide certain insight concerning the free speech debate.

The technological revolution undoubtedly confuses the workings of jurisdiction and rules for ethics, advertising and solicitation in the legal market. Further, these issues frustrate what has long been the bar's principal means of control—regulating the unauthorized practice of law. As technology expands the ways lawyers can practice, activities that constitute the "practice of law" is increasingly uncertain. This uncertainty is at the heart of the debate between lawyers and regulators. To prevent unauthorized practice from occurring, it is necessary to know what defines "practice."

5. What Constitutes the "Practice of Law"?—The law is ambiguous as to what constitutes the unauthorized practice of law and to whom the regulations apply. The Supreme Court of Arizona noted that "[i]n the light of the historical development of the lawyer's functions, it is impossible to lay down an exhaustive definition."[120]

Clearly, the practice of law encompasses more than trying cases in the courts.[121] Black's Law Dictionary defines the "practice of law" as "maintaining an office where [a person] is held out to be an attorney, using a letterhead

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115. *See supra* text accompanying note 84.

116. T. Gerald Treece, *The Law as a Foreign Language*, 40 S. TEX. L. REV. 971, 972 (1999).

117. 492 U.S. 469 (1989).

118. *See id.* at 471-72.

119. *See id.* at 482.

120. State Bar of Ariz. v. Ariz. Land Title & Trust Co., 366 P.2d 1, 8 (Ariz. 1961).

121. *See* Unauthorized Practice of Law Comm. v. Parsons, No. CIV.A.3:97-C-2859H, 1999 WL 47235, at *1, *4 (N.D. Tex. Jan. 22, 1999), *vacated and remanded*, 179 F.3d 956 (5th Cir. 1999).

describing [that person] as an attorney, counseling clients in legal matters, negotiating with opposing counsel about pending litigation, and fixing and collecting fees for services rendered."[122] In contrast to this seemingly narrow definition, Texas law defines unauthorized practice as "any service requiring the use of legal skill or knowledge."[123] Texas code then gives courts the authority to determine on a case-by-case basis whether other services and acts not enumerated under the statute constitute the practice of law.[124] This language appears somewhat vague and could arguably be applied to any situation where a person advises another on any topic.

In *In re Duncan*,[125] the court found that the practice of law may include the "preparation of legal instruments of all kinds, and, in general, all advice to clients, and all action taken for them in matters connected with the law."[126] However, a comprehensive definition of just what qualifies as the practice of law is "impossible," and "each case must be decided upon its own particular facts."[127] The court in *Palmer* held that the sale of will forms containing blanks and instructions constituted the unauthorized practice of law.[128]

The Quicken Family Lawyer program goes beyond merely instructing someone how to fill in a blank form. The program directs the user to "answer a few questions to determine which estate planning and health care documents best meet [the user's] needs" and that it will "interview you in a logical order, tailoring documents to your situation."[129] As the *Parsons* court noted, "[w]hile no single [aspect of this program] . . . may constitute the practice of law, taken as a whole Parsons [Technology] . . . has gone beyond publishing a sample form book with instructions, and has ventured into the unauthorized practice of law."[130]

A fundamental question is at what point information takes the form of legal advice. According to the New Jersey State Bar Association's Unlawful Practice

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122. BLACK'S LAW DICTIONARY 1172 (6th ed. 1980).

123. TEX. CODE ANN. § 81.101 (Vernon 2000).

124. *See id.*

125. 65 S.E. 210 (S.C. 1909).

126. *Id.* at 211.

127. Palmer v. Unauthorized Practice of Law Comm., 438 S.W.2d 374, 376 (Tex. App. 1969); *see also* Fadia v. Unauthorized Practice of Law Comm., 830 S.W.2d 162, 165 (Tex. App. 1992) ("The selling of legal advice is the practice of law.").

128. *Palmer*, 438 S.W.2d at 376.

129. Unauthorized Practice of Law Comm. v. Parsons, No. CIV.A.3:97-C-2859H, 1999 WL 47235, at *1 (N.D. Tex. Jan. 22, 1999), *vacated and remanded*, 179 F.3d 956 (5th Cir. 1999).

130. *Id.* at *6; *see also* People v. Landlords Prof'l Serv., 264 Cal. Rptr. 548, 553 (Cal. Ct. App. 1989) (finding that clerical services do not constitute the practice of law, but personal advice to a specific individual does constitute unauthorized practice); Fla. Bar v. Brumbaugh, 355 So.2d 1186, 1194 (Fla. 1978) (holding that sale of legal forms and instructions to the general public rather than to a specific individual for a particular legal problem does not constitute the practice of law); Or. State Bar v. Gilchrist, 538 P.2d 913, 917 (Or. 1975) (finding that advertisement and sale of divorce kits without personal advice does not constitute the practice of law).

Committee, it depends on the underlying purpose.[131] "If the software simply provides examples or general information on how to proceed with a will or a divorce, there's no problem . . . . [b]ut if it tells people specifically what not to do, what to put in and how to put it in, they may have a problem."[132] One commentator likens the issue to the use of a medical book: "You can tell people what the symptoms of an illness are and how to recognize an illness, but you can't treat somebody . . . [t]hat's the unauthorized practice of medicine."[133]

The issue of unauthorized practice is especially compelling considering that it will compound in accordance with available technology. However, technology can also increase business for lawyers that are authorized to practice. For example, some Web sites urge users to consult a real lawyer, which creates a marketing opportunity for law firms.[134] FreeAdvice.com offers tutorials on "everything from accident law to premarital agreements so consumers can sort out whether their claims are worth pursuing further."[135] The site then links to a list of endorsed attorneys.[136]

Confusion over jurisdictional boundaries, ethics and unauthorized practice is precisely why state bar regulators are concerned about who is responsible for the advice and whether it is dispensed by lawyers.[137] Regardless of counselors' intentions, responding to a question over the Internet might "unintentionally establish an attorney-client relationship in the mind of the person seeking advice and may render the provider liable for actions taken on the basis of offhand e-mail comments, forwarded far and wide."[138] Internet site operators may claim to merely offer general information about the law, not specific legal advice.[139] Yet, who is accountable to the Web-user who reasonably relies on that information? This is the question being posed by legal regulators. The answers are critical to the state of the legal marketplace because the analysis to determine whether "unauthorized" practice exists depends upon the very definition of "practice," and more importantly, whether it is necessary at all.

II. PUBLIC POLICY AND THE REGULATORY RESPONSE

The history behind statutes banning the unauthorized practice of law tells of a rationale that the legal profession is obligated to prevent nonlawyers from practicing law to protect the public against incompetents and to preserve the

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131. *See* Goldstein, *supra* note 107, at 3.

132. *Id.* (quoting Eric C. Landman, chairman of the New Jersey State Bar Association's Unlawful Practice of Law Committee).

133. *Id.*

134. *See* Schmitt, *supra* note 18, at B1.

135. *Id.*

136. *See id.*

137. *See id.*

138. Wendy R. Liebowitz, *Regulators Crack Down on 'Cyberlawyers,'* N.Y. L.J., Feb. 23, 1999, at 5.

139. *See* Schmitt, *supra* note 18, at B1.

practitioner's independence for the client's benefit.[140] Indeed, since the late 1800s, this alleged justification has gone largely unchallenged.[141] However, modern critics are questioning whether the benefits from the enforcement of such rules justify their continuation.

The invigorated initiative in Texas to ferret out the unauthorized practice of law presents an opportunity to question the theories that have long supported the monopolistic baseline. Why are states choosing to fight unauthorized practice now, when for the past century it has been a non-issue? This has given rise to questions about whether lawyer conduct is legitimate and deserving of an exclusive privilege to provide legal services free from outside regulation.[142] The paradigm is based on the notion that lawyers possess "esoteric knowledge inaccessible to laypersons," thus relieving them of the regulatory pressure that surrounds businesspersons.[143] Today, the widespread perception is that the law is essentially a business.[144] This perception is driving a fresh critique of the policies and merits behind the legal monopoly.

A. Consumer Protection

The stated mission behind regulations that prohibit the unauthorized practice of law is to protect consumer interests.[145] The theory purports that legal advice from non-lawyers is necessarily incompetent. Yet, in order for this premise to be sound, logic would dictate that absent such rules, the public would be unduly injured by legal incompetence. In reality, there is strikingly little case law involving injury to individuals from unauthorized practice.[146]

An examination of 144 reported unauthorized practice cases from 1908 to 1969 indicates only twelve that involve actual injury to anyone.[147] The vast majority of such actions have been brought by the bar as a result of committee investigations against potential dangers of such an injury, not direct complaints by consumers.[148] In fact, statistics show that only two percent of unauthorized practice inquiries, investigations, and complaints actually arise from consumer

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140. *See* Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—Or Even Good Sense?*, 1 AM. B. FOUND. RES. J. 159, 200 (1980).

141. *See id.* at 200-01.

142. *See* Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1238 (1995).

143. *Id.* at 1239 (quoting Raymon L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 146 (Robert L. Nelson et al. eds., 1992)).

144. *See id.* at 1232.

145. *See* Rhode, *supra* note 65, at 3.

146. *See* Christensen, *supra* note 140, at 203.

147. *See id.* at 203 n.235.

148. *See id.* at 203.

injury.[149] Another study concluded that complaints about the unauthorized practice of law come largely from lawyers themselves, who are protecting their turf.[150] Solid evidence regarding the malignant effects of legal self-help from software and the Internet is equally sparse. The Texas UPLC references anecdotal evidence of consumer problems arising from the use of self-help legal software, such as lost custody rights, incorrectly drafted deeds, wills with adverse tax consequences, and immigration misdeeds.[151] However, Nolo contends that there has yet to be a published court decision arising from an injury caused by self-help materials.[152]

The lack of evidentiary findings that unauthorized practice causes actual harm to consumers, though somewhat illustrative, does not warrant the conclusion that consumers will be relatively unharmed by self-help products. Nonetheless, certain insight can be gained from an analysis of the validity and merits of statutory will forms, where researchers studied the effects of consumer reliance on self-help in lieu of attorney counsel.

In 1993, a pilot study investigated the merits of self-help statutory will forms.[153] The chief problem with self-help forms was improper completion.[154] Less than thirty percent of all participants were able to answer the forms without error.[155] Further, nearly twenty-five percent of the wills were deemed partially invalid and another twenty percent raised potential problems.[156] Although over eighty percent of those studied favored the idea of will forms,[157] approximately half the total respondents believed the forms and instructions were inadequate to answer their questions.[158]

Erroneous completion of the forms was fatal in around twenty percent of the cases. The nearly 150 probate judges who responded to the query indicated that more than eighty percent of the forms actually offered for probate were admitted.[159] Those that were denied probate were due to improper execution,

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149. *See* Rhode, *supra* note 65, at 43.

150. *See id.* at 37.

151. *See* Robert L. Ostertag, *Nonlawyers Should Not Practice: Nothing Can Substitute for the Professional Skills and Values of a Lawyer*, A.B.A. J., May 1996, at 1.

152. *See Self-Help Law Books and Software*, *supra* note 38.

153. *See* Gerry W. Beyer, *Statutory Fill-In Will Forms—The First Decade: Theoretical Constructs and Empirical Findings*, 72 OR. L. REV. 769, 797 (1993). The study comprised statutorily-approved fill-in-the-blank will forms for four states: California, Maine, Michigan and Wisconsin. The will forms in this study were not legally valid, but void documents designed to test the self-help process. *See id.*

154. *See id.* at 784.

155. *See id.* at 810.

156. *See id.*

157. *See id.* at 804.

158. *See id.* at 802.

159. The probate judges were from the four states that comprised this study's population: California, Maine, Michigan and Wisconsin. *See id.* at 818.

ineffective dispositions of property, and errors in formalities and attestation.[160] Interestingly, the study indicated that about fifty percent of probate judges criticized the statutory will concept as being inadequate for individual needs, too confusing, and a negative factor responsible for deterring individuals from acquiring comprehensive estate plans.[161]

The study indicated that ostensible disadvantages of self-help included potentially dangerous misuse and frustrated intent. "Users may ignore portions of the form and leave blanks empty because they erroneously believe that certain sections are irrelevant," which in fact may render a will ineffective.[162] However, the statutory wills were viewed as potentially advantageous due to greater overall use and awareness of estate planning from reduced time, effort, and cost.[163]

Another interesting benefit cited by the study is the decreased reliance on commercial (versus statutory) self-help materials.[164] This evidences the legal community's disdain over entrepreneurs that desire to profit from the public's need for estate planning.[165] Products are faulted for not being prepared with a particular jurisdiction in mind, which may deceive a user concerning the validity and effect of the will.[166] "As a result, the forms and accompanying explanations usually are designed to look 'official' or 'legal' so that they sell, not to convey the information truly needed by the consumer."[167]

The above analysis is cursory and arguably limited in its application beyond self-help will forms. Yet, it drives a larger issue to the forefront: operating under the unconfirmed theory that consumers suffer from unauthorized practice, the legal profession has "engaged in disturbingly little introspection concerning the proper scope of its monopoly."[168] The absence of consumer injury begs the question whether regulators are upholding the law, or upholding lawyers. A growing contingent seems to question the motives of the legal community and whether consumer interests are best served by allowing consumers to counsel themselves, where possible. Advocates for self-help believe that the benefits outweigh the dangers and rely on the premise that "most people have a basic store of common sense and are honest, fair and intelligent enough to know when they need legal advice."[169] There is a line separating when lawyers are needed

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160. *See id.*

161. *See id.* at 823.

162. *Id.* at 784.

163. *See id.* at 778.

164. *See id.* at 780.

165. *See id.* at 781-82.

166. *See id.* at 781. Certain publications often assert that the supplied will form is valid in all states. *See, e.g.*, SJT ENTERPRISES, DO-IT-YOURSELF WILL KIT (1993) (asserting that "[t]his kit is valid in all states"); E-Z LEGAL FORMS, LAST WILL & TESTAMENT KIT (1991) (asserting that it is "[v]alid in All 50 States").

167. Beyer, *supra* note 153, at 782.

168. Rhode, *supra* note 65, at 3.

169. Beyer, *supra* note 153, at 795 (quoting James N. Zartman, *The New Illinois Power of Attorney Act*, 76 ILL. B.J. 546, 553 (1988)).

and when consumers can take care of themselves. The issue is where to draw it.

Legal protectionists advocate that consumers who truly need a lawyer's counsel rather than a commodity product will suffer if self-help evolves. Indeed, there are (and will continue to be) ample situations where an attorney's individualized advice and representation are warranted.[170] For these needs, self-help avenues will not likely suffice. It is ironic, then, that arguments against self-help products are targeted to the low-end consumer (whose needs may be legitimately satisfied by such products). Consider one legal commentator's forecast of the self-help market:

> Kiosks at shopping malls will offer such things as wills. Insert a credit card, answer a few questions, and out pops an 'estate plan.' That same technology of expert systems and artificial intelligence available to attorneys will be easily accessible to those who choose to rely upon such systems for legal self help .... [N]on-lawyer 'document preparers,' such as the present divorce and bankruptcy services ... performing what has heretofore been deemed to be the unauthorized practice of law, will proliferate as the Information Age reaches adolescence.[171]

The linchpin of the arguments supporting the exclusive professional license is the claim that the lawyer-client relationship is asymmetric: clients cannot adequately evaluate the quality of legal services, and consequently they must rely on those they consult.[172] However, commentators note that "legal services resemble many other goods and services in terms of consumers' ability to evaluate them."[173] Many consumers are more sophisticated than the legal community gives them credit for, and they may not need such heightened protections.[174] Further, allowing consumers the freedom to choose would not necessarily slight those consumers who lack the ability to evaluate legal services. In accordance with the free market philosophy, they may opt out of the self-help market and procure legal assistance through other means (such as hiring a lawyer or pursuing public assistance programs). Self-help legal materials may even place consumers in a better position for quality legal counsel by empowering the public to become informed about the law. Particularly for mundane legal matters, such as uncontested divorces and wills, where lawyers charge disproportionately high prices by virtue of their monopoly, self-help is justifiable.

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170. *See id.*

171. Crostwait, *supra* note 43, at 3.

172. *See* Anthony Bertelli, *Should Social Workers Engage in the Unauthorized Practice of Law?*, 8 B.U. PUB. INT. L.J. 15, 34 (1998) (citing Roger Cramton, *The Future of the Legal Profession: The Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531 (1994)).

173. Pearce, *supra* note 142, at 1267.

174. *See id.*

B. The Legal Monopoly in a Free Enterprise System

Lawyers have historically achieved autonomy from external regulation under the theory that their commitment to clients and public service surpasses their financial self-interest.[175] The term "professional" means lawyers should "subordinate self-interest and private gain to the interests of a client or, generally, to the public good."[176] However, more than twenty years ago the U.S. Supreme Court recognized in *Bates v. State Bar of Arizona*[177] that lawyers are motivated by financial gain, in addition to (and perhaps above) protecting the public good.[178] Indeed, by 1987, "the legal services industry 'added over $60 billion to the gross national product.'"[179] The law has become a larger industry than steel or textiles.[180] In piercing the veil that long protected lawyers from marketplace rules, the *Bates* Court declared "the belief that lawyers are somehow 'above' trade has become an anachronism."[181]

The gap in competence between professionals and laypersons, institutionalized by the monopolies of training, certification, and enforcement, necessarily sets professionals apart.[182] In essence, some argue, the legal industry has intentionally mystified itself in order to be self-perpetuating. The law remains inaccessible because it appears to be written in a "foreign language" the general public cannot understand.[183] One critic notes that "[m]ystification is aggression upon the spiritual autonomy of others; it is inevitably a depersonalizing assertion of hierarchal status based on the assumption that there is an authority somewhere that has the right to assign and enforce identities."[184] The result is that restricting the passage of legal information has produced a society of legal illiterates.[185]

Despite the longstanding rationale that regulations against unauthorized practice are necessary to protect consumers, others advocate that consumer interests are best protected by the ideals of free enterprise. The legal theory underlying prohibitions against unauthorized legal practice is that low cost

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175. *See id.* at 1229.

176. Treece, *supra* note 116, at 972.

177. 433 U.S. 350, 371-72 (1977).

178. *See id.* at 368-69; *see also* Pearce, *supra* note 142, at 1249.

179. Pearce, *supra* note 142, at 1251 (quoting Robert L. Nelson & David M. Trubek, *New Problems and New Paradigms in Studies of the Legal Profession*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 1, 8 (Robert L. Nelson et al. eds., 1992)).

180. *See id.*

181. *Bates*, 433 U.S. at 371-72.

182. *See* MAGALI S. LARSON, THE RISE OF PROFESSIONALISM—A SOCIOLOGICAL ANALYSIS (Univ. of Calif. Press 1977).

183. Treece, *supra* note 116, at 972.

184. Rieber, *supra* note 35 (quoting THEODORE ROSZAK, PERSON/PLANET: THE CREATIVE DISINTEGRATION OF INDUSTRIAL SOCIETY (1979)).

185. *See Self-Help Law Books and Software*, *supra* note 38.

services will also be low in quality.[186] However, economic theory holds that increased competition in the legal market "would likely result in better quality services at a lower cost."[187] Confining the legal practice to members of the organized bar is an ineffective means of achieving quality assurance; instead it leads to higher fees and an artificial shortage of legal assistance.[188]

In this sense, the self-help legal market could actually improve the quality of services available from lawyers. The more resources available for consumers to tap, the more service providers would be required to compete for business, both on price and quality. Their ability to compete on price would be hampered, since lower-priced self-help products would be an alternative. Thus, legal service providers would resort to compete on quality (similar to most other players in the free market).

Although many lawyers attempt to defend their autonomy under the auspices of fidelity and consumer protection, industry commentators have discredited this position by taking note of the decline of professionalism in the legal field.[189] Indeed, critics view unauthorized practice of law regulations as "deliberately constructed violations of the principles of free trade among the states, and of the antitrust laws that have governed every other sphere of domestic commerce for nearly a century."[190]

C. Faith in Consumer Intelligence

Regulations against the unauthorized practice of law assume either that lawyers lack the confidence to meet free and open competition, or they lack faith in the intelligence of the public to make sound decisions.[191] It seems neither premise is admirable or accurate. Banning a self-help product because it may cause harm to legal consumers assumes that consumers are unable to judge for themselves whether the legal product is appropriate for their needs.[192] Arguably, most consumers are capable of determining for themselves when they need to turn to a licensed lawyer. Likewise, people can perceive that many law-related issues can be handled without the aid of a lawyer. After all, people do their own taxes, life insurance, healthcare, and home maintenance; and they often rely on self-help books and learning aids to assist in these endeavors.[193] Thus, in many areas other than the law, individuals are free to turn to self-help.

If the rationale that requires use of a licensed lawyer is to prevent harm to the public, why is it satisfactory for people to harm themselves by doing their own

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186. *See* Bertelli, *supra* note 172, at 15.

187. Pearce, *supra* note 142, at 1232-33.

188. *See* Bertelli, *supra* note 172, at 37.

189. *See* Anthony E. Davis, *New Jersey and the House of Lords*, N.Y. L.J., Jan. 4, 1999, at 5.

190. *Id.*

191. *See* Christensen, *supra* note 140, at 216.

192. *See* Elias & Jermany-Elias, *supra* note 2.

193. *See id.*

taxes or insurance?[194] Despite this inconsistency, many self-help products are careful to indicate which situations require professional assistance. For those instances requiring individualized counseling, the products also contain explanations and disclaimers regarding individual responsibilities when using self-help products.

The law profession's general reference to the "public interest" neglects to delineate other important public interests such as unrestrained trade, the interest in readily available legal services, and the public interest in freedom of choice.[195] "[T]he essence of the democratic idea is the notion that the individual can think for himself, that he is capable of making his own decisions."[196] Freedom of choice is a fundamental tenet of the American marketplace. Naturally, individual freedom cannot go wholly ungoverned; such a contention is blind to the concept of ordered society. However, certain protections are provided by criminal law, tort law, and consumer protection laws. Counter to the traditional monopoly approach, consumers in an open market could make informed decisions about the purchase of legal services.[197]

In addition, some argue that enjoining the distribution of self-help legal materials runs counter to the principles behind the rights of citizens to represent themselves in court. In *Faretta v. California*,[198] the U.S. Supreme Court ruled that a person could be self-represented in a murder case involving the death penalty.[199] In *Faretta*, the Court noted that the right of self representation has been "protected by statute since the beginnings of our Nation. [P]arties may plead and manage their own causes personally or by the assistance of such counsel."[200] If self representation in a murder case is permissible, then why would it not be permissible, for example, in an uncontested divorce or bankruptcy, where much less is at stake?[201] Further, if the Constitution guarantees citizens the right to represent themselves, then how can the act of providing information to aid such endeavors be wrong?

In 1995, the ABA published a report on the nexus between unauthorized practice restrictions and the legal needs of low-income individuals.[202] The report called for states to adopt an analytical approach in assessing whether and how to regulate varied forms of nonlawyer activity, considering 1) the risk of harm presented by these activities, 2) whether consumers can evaluate providers' qualifications, and 3) whether the net effect of regulating unauthorized practice

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194. *See id.*

195. *See* Christensen, *supra* note 140, at 201-02.

196. *Id.* at 202.

197. *See* Pearce, *supra* note 2, at 1249.

198. 422 U.S. 806 (1995).

199. *See id.* at 836.

200. *Id.* at 812-13 (quoting Judiciary Act of 1789, § 35, 1 Stat. 73, 92) (current version at 28 U.S.C. § 1654 (2000)).

201. *See* Elias & Jermany-Elias, *supra* note 2.

202. *See* Bertelli, *supra* note 172, at 40.

will benefit the public.[203] The ABA itself recognized that "Americans are independent-minded and historically value choice in pursuing services of any kind. Government efforts to restrict individual choice are, thus, unpopular in this country."[204] The report states that "when consumers know the pros and cons of the choices of assistance, they will make reasonable ones with which government need not unduly interfere."[205]

D. Lack of Access to Affordable Legal Counsel

Certain legal commentators believe the popularity of the self-help legal market is a symptom of a longer-standing problem: the lack of affordable legal assistance.[206] In the 1980's, the ABA estimated that at least 100 million Americans lacked adequate access to the courts, often because they could not afford it.[207] Nationally, only one-quarter of low-income and one-third of middle-income households have their legal needs met.[208] In 1992, a study found that forty-eight percent of low-income households reported involvement in a situation of requisite severity for resolution in the justice system.[209] Of those households, thirteen percent consulted a non-lawyer third party, forty-one percent attempted to handle the situation themselves, and thirty-eight percent did nothing.[210]

More recent evidence suggests a similar story. On-line newsgroups feature pleas for legal assistance from lay persons who claim to have been injured in accidents, fired from jobs, treated unfairly in divorce proceedings, or otherwise confronted by a situation demanding a legal response.[211] Unfortunately, legal clinics do not provide a ready solution. Due to "lack of funding, accessibility to legal aid clinics is dwindling."[212] The Legal Services Corporation, which provides services to the nation's poor, "turns away thousands of potential clients annually because of cutbacks in funding."[213] In 1993, only 1.5 million of the fifty million potentially eligible clients received services,[214] and in 1994, sixty percent of those seeking assistance were turned away.[215]

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203. *See id.*

204. *Id.* at 37.

205. *Id.* at 133.

206. *See id.*

207. *See id.*

208. *See* Deborah L. Rhode, *Meet Needs with Nonlawyers: It Is Time to Accept Lay Practitioners—and Regulate Them*, A.B.A. J., Jan. 1996, at 1.

209. *See* Bertelli, *supra* note 172, at 18, 19.

210. *See id.* at 19.

211. *See* Lanctot, *supra* note 4, at 151.

212. Treece, *supra* note 116, at 971.

213. Raymond P. Micklewright, *Discrete Task Representation A/K/A Unbundled Legal Services*, COLO. LAW., Jan. 2000, at 5.

214. *See id.*

215. *See id.* (citing Francis J. Larkin, *The Legal Services Corporation Must Be Saved*, JUDGES J., Winter 1995, at 1).

A macro-perspective shows that, concomitant with the liability associated with on-line counsel, self-help provides enormous promise for meeting the unmet legal needs of consumers. As a way of getting law to the people, e-law could open new markets and provide an inexpensive means of delivering legal services to the poor.[216] In fact, supporters of self-help point to the lack of access to the legal market as evidence that strong regulations against the unauthorized practice of law actually harm consumers more than they help.[217] "The truth is that millions of Americans are priced out of the legal system."[218] Some find it difficult to justify regulating unauthorized legal practice to ensure the quality of legal services when the result is that the poor population receives no legal services at all.[219] "It is equally difficult to assert that persons have meaningful access to justice resulting from the right to proceed pro se when a lay person cannot realistically negotiate our complex legal system."[220] For these reasons, the demand has increased for self-help legal assistance.[221] "There is a serious problem in this country because many people either can't afford attorneys or, to be blunt, don't trust attorneys or don't want to pay an attorney."[222]

Supporters of self-help note that such products make legal services more available to low-income persons, thus contributing to the administration of justice. This view is related to the unfortunate reality in the modern legal system that contrary to the goal of equal justice under the law, "justice . . . is related to the quality of lawyering that a client can afford."[223] Currently, less sophisticated consumers presumably access legal services through consumer guides or paid referral services if they feel they lack expertise.[224] Although the self-help market may not fully provide equal access to legal services, it is a marked improvement to the existing system.

The State Judicial Council of California is taking the unique approach of embracing self-help to benefit the low-income population. Despite some resistance from lawyers, the program encourages local courts to provide self-help centers for persons requiring assistance with family law.[225] In addition, the state has repeatedly proposed a licensing system for low-cost paralegals, though

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216. *See* Johnston, *supra* note 1, at 36.

217. *See* Pearce, *supra* note 142, at 1238.

218. Greenwald, *supra* note 104, at 51 (quoting James Turner, executive director of Help Abolish Legal Tyranny (HALT), a legal reform group).

219. *See* Bertelli, *supra* note 172, at 15.

220. *Id.* at 15-16.

221. *See id.* at 17.

222. Liebowitz, *supra* note 6, at A18 (quoting Mark J. Welch, an attorney and consultant on Internet commerce).

223. Pearce, *supra* note 142, at 1271 (quoting Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should Be Allowed To Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1112 (1985)).

224. *See id.* at 1273.

225. *See* Marc L. Caden & Stephanie E. Lucas, *Accidents on the Information Superhighway: On-Line Liability and Regulation*, 2 RICH. J. L. & TECH. 3 (1996).

lawyer groups have fended off the attempts thus far.[226]

III. BALANCING THE INTERESTS OF CONSUMERS AND THE LEGAL INDUSTRY: SOLUTIONS AND ALTERNATIVES WITH SELF-HELP

A. Feasibility of Regulation and the Appropriate Driving Force

In connection with the difficulties posed to regulators struggling to keep pace with technology, confusion exists regarding exactly how to regulate.[227] Whether the ABA is best situated to protect consumer interests in the field of cyberlaw is not a foregone conclusion. In the law, where there are "demonstrable grounds for paternalism, [the enforcement of unauthorized practice] should emanate from institutions other than the organized bar."[228] Some critics question whether the states would be better equipped to make the determination. According to one commentator following *Parsons*, "[h]opefully, what [this case] will stimulate is thoughtful consideration in each state about what [is] appropriate."[229]

A critical analysis of the issues in cyberspace logically begins with whether our existing framework of laws is sufficient to handle Internet issues.[230] State lawmakers are beginning to target on-line regulation, though at this point, the subject matter seems limited to tortious or criminal communications.[231] The Texas UPLC has shut down several Web sites for practicing law without a license, including one site where non-lawyers were processing divorce petitions for a fee.[232] While our current system may be sufficient in some areas, technology is bound to present unique and unfathomed scenarios for which our system is ill-equipped. Legal commentators have considered this challenge:

> Political pressure exists to pass regulatory measures which would severely inhibit the development and growth of the Internet. Legislation

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226. *See* Associated Press, *supra* note 99. Chief Justice Phillips says U.S. Attorney General Janet Reno has called for the broadening of authority of paralegals as a way to meet the legal needs of the poor. *See* Elliot, *supra* note 88, at 4.

227. Some assert that the Internet's unique qualities warrant heightened regulation as compared to other media, based on 1) interactive capabilities; 2) the economic feasibility of transmitting vast amounts of information; and 3) the speed and personal nature of communications that threaten undue influence by solicitors. *See* T.K. Read, *Pushing the Advertising Envelope: Building Billboards in the Sky Along the Information Superhighway*, 23 W. ST. U. L. REV. 73, 96 (1995). Others argue that Internet regulation should be minimized to avoid undermining its value for information sharing. *See* ACLU v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996).

228. Rhode, *supra* note 65, at 99.

229. Liebowitz, *supra* note 138, at 5 (quoting Will Hansley, staff counsel to the ABA Division for Legal Services).

230. *See* Caden & Lusas, *supra* note 225.

231. *See, e.g.*, 1995 Ga. Laws 322 (prohibiting the computer transmission of bomb-making instructions); 1995 Va. Acts ch. 839 (restricting child pornography on the Internet).

232. *See* Schmidt, *supra* note 18, at B1. Texas UPLC chairman Mark Ticer remarks, "[t]hese things may be very well-meaning . . . [b]ut who [sic] are they accountable to?" *Id.*

> aimed at restricting the Internet will be challenged on First Amendment grounds and potentially held unconstitutional. It is difficult to imagine, even if such legislation were passed, how it could be applied to individuals from other nations who distribute material to the United States. Within our own country, it is unclear how "community standards" can be applied to Internet transmissions available to every city, county, and state in America.[233]

Regardless of the difficulty that necessarily accompanies regulation, litigation over on-line matters will inevitably increase. From a logistical standpoint, "[j]udicial resolutions may be the only avenue for companies and individuals to clear the Internet's murky waters."[234]

B. Proposed Solutions

1. Caveat Emptor.—One way that commentators propose reducing the risk to consumers is by use of disclaimers on self-help products and sources. The purpose of a disclaimer is to ensure that an attorney-client relationship does not arise when a person contacts a firm's Web page.[235] However, despite the common use of disclaimers, ethical and legal concerns have prevented many attorneys from creating interactive Web pages and otherwise participating in global conversation. If more restrictive ethical rules appear, some attorneys will be deterred from embracing technology. Nonetheless, disclaimers are hardly a guarantee. In *Parsons*, the court recognized that when users install the Quicken Family Lawyer software, a disclaimer appears on the screen.[236] According to the *Parsons* court, "[the] false impression [of reliability] is not diminished by the program's disclaimer. There is no guarantee that the person who initially uses the program is the same person who will later use and rely on the program."[237]

Attorneys who offer legal information on their Web sites "need to make clear to browsers that [the information is] for educational purposes, not intended as legal advice. Otherwise, they may find an attorney-client relationship has formed."[238] The more a lawyer learns about a questioner's case, the greater the risk of establishing an attorney-client relationship and exposure to malpractice claims.[239] "The lawyer's not charging for the advice does not protect him if the advice turns out to be unsound, just as it wouldn't [] in a real-world pro bono

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233. Caden & Lucas, *supra* note 225, at 95.

234. *Id.* at 101.

235. *See* Dietrich, *supra* note 57, at 13.

236. *See* Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., No. CIV.A.3:97-C-2859H, 1999 WL 47235, at *2 (N.D. Tex. Jan. 22, 1999), *vacated and remanded*, 179 F.3d 356 (5th Cir. 1999).

237. *Id.* at *6.

238. Leigh Jones, *Things to Watch When Doing Business on the Web*, J. RECORD, July 24, 1997, at 2.

239. *See* Resnick, *supra* note 42.

case."[240] Further, "[s]ince a lawyer's [W]eb page will be viewed outside the state of licensing, it should clearly indicate where the lawyer is licensed."[241]

2. Regulate the Self-Help Market with a Sliding Scale Approach.—To the degree that a state has a compelling interest in regulating legal advice by non-lawyers, a state could advance a "constitutionally permissible" system of regulation, rather than an outright ban.[242] Under this approach, a regulatory body could "certify" the materials, thus giving consumers the choice between certified and uncertified products.[243] This approach would neither require any change to the licensing of lawyers, nor would it necessitate that anyone but trained and committed lawyers hold themselves out as attorneys.[244] In short, the public could exercise its freedom of choice over a variety of legal options.

For example, the self-help market could be audited and tested.[245] Alternatively, the bar could require a special license to sell legal software.[246] "Before granting a license, attorneys could review legal software for competence and accuracy," and the license could be revoked if the products fail to meet established standards.[247]

3. Clarify Regulatory Confusion Via a System of Uniform Rules.—Part of the difficulty for legal regulations and the self-help market alike is that regulations are varied. As e-commerce spreads, states and industries are hurriedly trying to develop rules to protect personal and commercial interests. This leads to a conundrum: How does one comply with the rules without knowing what they are? In fact, many states have specific rules that address a problem that is, practically speaking, ajurisdictional.[248] A primary function of the rules regulating the legal community is to "provide lawyers with guidance on how they should properly disseminate information about their services."[249] "As applied to the Internet, current regulations [do not] seem to serve [that] purpose"[250] because the Internet blurs state lines, rendering varying state regulations difficult to apply.

For these reasons, some suggest that although regulation is along state lines,

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240. *Id.* (quoting Professor Ronald D. Rotunda, University of Illinois College of Law).

241. LAWYERS' MANUAL, *supra* note 68, § 81:568, at 58-59. "Without such a disclosure, a lawyer's Web page may be considered misleading." *Id. See also In re* Schwarz, 132 N.E. 921 (N.Y. Ct. App. 1921) (sanctioning a lawyer for sending cards and letterhead implying that he was authorized to practice law in states where he was not).

242. Christensen, *supra* note 140, at 213.

243. *See id.* at 214.

244. *See id.*

245. *See* Brown, *supra* note 71.

246. *See id.* at 171.

247. *Id.*

248. *See* Peter Krakaur, *Internet Advertising: States of Disarray? Are Uniform Rules a More Practical Solution?*, N.Y. L.J., Sept. 15, 1997, at 54; *see also* Matt Ackerman, *ABA Panel Urges Special Rules for Lawyer Solicitation on Web*, N.J. L.J., Sept. 21, 1998, at 9.

249. Krakaur, *supra* note 248, at 54.

250. *Id.*

a national approach may be necessary.[251] "Uniform rules would level the field for all lawyers, and provide clear guidance on how to disseminate information to the public."[252] Further, "such rules would insure that the public receives consistent, complete and clear information about the law and the availability of legal services."[253] One commentator notes that the "notion of a local bar locally licensed to serve local clients is anachronistic in an era of national and global law firms attending to the needs of clients with cross-border problems."[254]

One hurdle to implementing a uniform regulatory system is that local lawyers may resist outside competition if clients can seek advice from outside sources or the Internet.[255] Yet, proposals for a national practice may actually sustain the bar's competitive advantage.[256] States' two main interests in requiring locally-licensed lawyers are accountability for competence and honesty.[257] As for competence, a great deal of American law is uniform (except for probate, real estate and family law matters, where variations might be more significant).[258] Exclusion may not be justified where an out-of-state lawyer, who is more versed in a particular area of the law, could provide services superior to a less-qualified in-state lawyer.

Further, accountability is not necessarily sacrificed under this approach. If a client retains an out-of-state lawyer, his good standing there may provide sufficient protection.[259] "If the host state wants more protection for its citizens, it can create 'long-arm discipline,' giving it professional jurisdiction over any lawyer who performs legal work within its borders, actually or virtually."[260] Lawyers in good standing should be able to render services to clients anywhere, and states can declare certain areas off-limits if they involve unusually unique state law issues.[261] One commentator views this issue with critical imminence: "If we do not construct a system that moves us toward national bar admission and national regulation . . . , we will find one day that, like dinosaurs, we have become extinct."[262]

4. Dispel the Legal Monopoly and Embrace Free Enterprise.—Critical analysis of the rationale underlying the legal monopoly reveals flawed logic. To base a centuries-old policy of unauthorized practice on a presumption that

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251. *See id.*

252. *Id.*

253. *Id.*

254. Stephen Gillers, *Unauthorized Practice: Rules Update Needed: Morass of Local Systems Is Anachronistic in Age of Global Business*, FULTON COUNTY DAILY REP., Nov. 12, 1998, at 7.

255. *See id.*

256. *See id.*

257. *See id.*

258. *See id.*

259. *See id.*

260. *Id.*

261. *See id.*

262. Davis, *supra* note 189, at 5.

consumers are incapable of making sound decisions insults the intelligence of both consumers and lawyers. Indeed, dispelling the myth surrounding legal practice and embracing a free market philosophy will benefit consumers, and in the process, improve the quality of legal services in general.

The free market has successfully developed "rules of the road" to protect buyers, sellers, and intermediaries and avoid heavy-handed government regulation. These tools may adequately protect the interests of self-help legal consumers. The Uniform Commercial Code (UCC) provides one approach, which would apply the Deceptive Trade Practices Act to legal software.[263] To the extent that self-help legal products would be subject to UCC jurisdiction, consumers could derive protection from practices that fall short of the code's standards.

Another approach is to consider whether "unbundling" legal services, known as "discrete task representation" (DTR), provides a more effective model for lawyers to use in offering limited legal help that many people need but cannot afford.[264] DTR is akin to a compromise between the demand for legal services among the low-resource sector and the requirements of competence and ethics as set forth by the bar. The concept of parceling out counsel is a response to the deluge of self-help and *pro se* litigation that has resulted from expensive legal services, outmoded and time-consuming methods, and the public's resentment toward lawyers.[265]

In "unbundled" representation, an attorney is available to an individual to give specific advice on a legal matter (e.g., reviewing a will drafted by a client, negotiating a discrete issue, or researching particular topics).[266] The problem with unbundling is the conflict between a lawyer's duty of impartiality and the overriding necessity to assure that cases are fully and competently represented.[267] "[A]s distinguished from accepting responsibility for a client no matter what task is required[,] the onus of fair and adequate representation is shifted to a court officer who is neither competent nor accountable to any regulatory or disciplinary body for the faithful discharge of the duty."[268] Nonetheless, the need for an immediate solution is clear, and some states have already enacted rules that make unbundling ethically permissible.[269]

The above-referenced examples illustrate the willingness of the market to bridge the accessibility of legal self-help with quality assurance. The concept is not new. Noted legal commentator Karl Llewellyn recognized the futility of efforts spent protecting the legal monopoly as early as the 1930s. Llewellyn urged the bar to divert the time, energy and resources expended on fighting

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263. *See* Polly Ross Hughes, *Potential Ban on Legal Software Spurs Reform Call*, HOUSTON CHRON., Feb 14, 1999, at S1.

264. Lanctot, *supra* note 4, at 167.

265. *See* John L. Kane, Jr., *Debunking Unbundling*, COLO. LAW., Feb. 2000, at 15.

266. *See* Micklewright, *supra* note 213, at 6.

267. *See* Kane, *supra* note 265, at 16.

268. *Id.*

269. *See id.*

unauthorized practice to instead improving the legal services provided to the public.[270] Instead of relying on regulated mandates to protect the legal market, licensed practitioners could deliver a better product, which the market would demand. In this sense, the legal monopoly appears to underestimate more than consumer intelligence; it also indicates that lawyers underestimate their own value in the marketplace. Licensed lawyers have much to offer consumers, including valuable resources such as individualized counsel, sound advocacy skills, legal proficiency, and a commitment to high ethical standards.[271]

Lawyers who embrace market advances and technological trends can expedite routine matters and cut unneeded costs for clients through heightened efficiency. They will accrue more time to provide individual attention and advice. Further, attorneys may utilize technology to enhance their legal knowledge and efficiency, and pass along savings in time and money to clients.[272]

"Indeed, having to stand virtually unprotected in the legal service marketplace may force the legal profession to do some important things that it has heretofore neglected,"[273] such as improving the quality and image of the bar. Lawyers might actually "appear to be what they should be—proud, self-confident, able professionals, willing to be judged by the public on their merits."[274]

CONCLUSION

The state of the modern legal marketplace is an appropriate concern for the new millennium. Information technology has reshaped the ways lawyers deliver services and the ways consumers procure them. The self-help legal market capitalizes both on available technology and the demands of a public that, for centuries, has been forced to support a monopoly of law. Clearly there are instances where consumers will need the individualized attention of an experienced, licensed lawyer. It would be impractical to advocate that consumers will always make sound choices, or that no actual harm will inure to them from unlicensed legal sources.

Disturbing, though, is the perpetuation of a legal monopoly whose arguably flawed rationale has gone unchallenged since its inception. The evolution of self-help drives this issue to the forefront. "At every level of enforcement, the consumer's need for protection has been proclaimed rather than proven."[275] The very nature of the Information Revolution is to deliver better information to people for a healthier and more productive society. To this end, society would be well served if regulators boldly attempt to balance consumer interests and the interests of the legal industry in a modern context.

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270. *See* Christensen, *supra* note 140, at 212.

271. *See id.* at 214.

272. *See, e.g.*, Jeffrey R. Kuester, *Attorney Sites Can Avoid Violations of Ethics Rules*, NAT'L L.J., Aug. 12, 1996, at B11.

273. Christensen, *supra* note 140, at 215.

274. *Id.* at 216.

275. Rhode, *supra* note 65, at 97.

INTRUSION AND THE MEDIA: AN OLD TORT LEARNS NEW TRICKS

JENNIFER L. MARMON*

INTRODUCTION

It is 9:30 p.m. on October 20, 1996. As Marietta Marich settles into the couch to watch a movie in her Houston home, the phone rings. The man on the other end of the line insists upon talking to her husband, who is asleep in the next room. Thinking it is a sales call, Marietta starts to hang up. Then the man says, "Are you Michael Marich's mother?" She tells him that she is. "Well, your son is deceased." As the moments pass, the Marichs grapple with grief as the police officer explained that their son's body was found in his Los Angeles apartment, apparently dead of a drug-overdose. Unbeknownst to the Marichs, a camera crew in Michael's apartment was recording every sorrow-stricken sound.[1]

The camera crew accompanied police to Michael Marich's apartment to film a segment for the television series *L.A.P.D.: Life On The Beat.* Four months later, after begging the producers not to air the segment, Michael's mother was working on an assignment for her eighth grade students when she caught site of something familiar on the muted television. It was a curtain, slightly askew, just like the one she continually reminded Michael to fix. There was a man seated on the floor cross-legged. He was shirtless, his limbs were rigid in death, and he was gruesomely bent forward with his head nearly touching the carpet. Next to him was a two-headed dinosaur, a toy Marietta recognized as something a friend had given to Michael.[2]

In 1999, the Marich's won an invasion of privacy suit against the media outlets based on the recorded phone call.[3] The case is among a growing line of cases presenting the difficult question: When does a television network cross the line from reporting the news to invading privacy? With increasingly sophisticated surveillance equipment, undercover investigative tactics have become more commonplace. And in the intensely competitive world of reality-based television and newsmagazine shows, reporters are driven to not only get the story, but to get it in the most dramatic way.

Historically, courts have taken a "hands off" approach with the media, allowing most of its actions to fall under the protective umbrella of the First Amendment.[4] But recent court decisions show a diminishing tolerance for

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1. *See* Howard Rosenberg, *A Family's Pain, for All to See*, L.A. TIMES, Nov. 29, 1998, at F8.

2. *See* Howard Rosenberg, *Pleas For Privacy, Left Unheeded*, L.A. TIMES, Nov. 30, 1998, at F1.

3. *See* Marich v. QRZ Media, Inc., 86 Cal. Rptr. 2d 406 (Cal. Ct. App. 1999), *review denied*, No. S081294, 1999 Cal. LEXIS 7291 (Cal. Oct. 22, 1999) (unpublished opinion).

4. *See, e.g.*, Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975); N.Y. Times Co. v. Sullivan,

intrusive newsgathering tactics.[5] These decisions are giving new life to the tort of intrusion by expanding it to encompass invasions of privacy in semi-public places. Although the threat of liability may clean up some of the most offensive behavior by tabloid television programs, it also stands to undercut legitimate investigative journalism by chipping away at the media's First Amendment rights. The traditional interpretation of the tort of intrusion upon seclusion prohibited the media from intruding into private places. Recent cases, however, have effectively removed "upon seclusion" from the title of the tort of intrusion by imposing liability on media outlets covering events occurring in semi-public places. Further expansion of the tort will chill legitimate newsgathering by instilling fear of liability and will cause confusion over what the press may cover in the elusive "semi-public" place.

This Note will analyze the newly invigorated tort of intrusion, its recent applications to the media, and the dangers of further infringement on the First Amendment. Part I of this Note provides historical background for the nearly absolute First Amendment protection courts have given publication of truthful information and discusses the varying approaches courts have taken when applying the First Amendment to newsgathering. Part II discusses two recent U.S. Supreme Court decisions involving media "ride-alongs" with police that show a fading tolerance for intrusive newsgathering activities.[6] Parts III and IV analyze the tort of intrusion as it has been applied to the media before and after the Supreme Court decisions. Finally, Part V of this Note discourages further expansion of the tort and suggests self-regulation.

I. SCOPE OF FIRST AMENDMENT PROTECTION

A. Broad Protection for Publication

Historically, courts have taken a "hands off" approach to media regulation to avoid infringing on First Amendment rights. In a landmark case for the press, *New York Times Co. v. Sullivan*, the U.S. Supreme Court provided nearly absolute First Amendment protection to the publication of truthful speech.[7] By requiring public figures to show falsity and actual malice in a libel suit, *Sullivan* also extended First Amendment privileges to false speech.[8] An "erroneous statement is inevitable in free debate[;] . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"[9]

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376 U.S. 254 (1964).

5. *See, e.g.*, Wilson v. Layne, 526 U.S. 603 (1999); Sanders v. Am. Broad. Cos., 978 P.2d 67 (Cal. 1999), *review denied*, No. S059692, 2000 Cal. LEXIS 1892 (Cal. Mar. 15, 2000); *Marich*, 86 Cal. Rptr. 2d at 406.

6. *See Wilson*, 526 U.S. at 603; *see also* Hanlon v. Berger, 526 U.S. 808 (1999).

7. 376 U.S. 254 (1964).

8. *Id.* at 283, 286. The court held that factual error and defamatory content alone are not enough to remove the "constitutional shield from criticism of official conduct." *Id.* at 273.

9. *Id.* at 271-72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

The ruling in *Sullivan* insulated the media from liability for publication unless it published information it knew to be false with malicious intent.[10]

Later Supreme Court decisions enhanced the First Amendment protection announced in *Sullivan*. In *Cox Broadcasting Corp. v. Cohn*, the Court held that the publication of truthful information released to the public in official court records was constitutionally protected.[11] The Court recognized that to rule otherwise "would invite timidity and self-censorship and very likely lead to suppression of many items that would otherwise be published and that should be made available to the public."[12] The Court reiterated its concern for overdeterrence in *Florida Star v. B.J.F.* when it refused to impose liability for publishing truthful information that was lawfully obtained from police records.[13] Gleaning information from government documents is a common reporting technique. To impose liability for disseminating information found in those public records would violate the First Amendment and lead to self-censorship.[14]

From *Sullivan* and its resulting line of cases, it is evident that the media receives broad First Amendment protection for the information it publishes. Yet how much protection does the First Amendment afford the gathering of this information before publication?

B. Unsettled Level of Constitutional Protection for Newsgathering

The Supreme Court has conceded that "news gathering is not without its First Amendment protections" but has offered little guidance as to the scope of such protection.[15] In *Branzburg v. Hayes*, the Court recognized that some protection for newsgathering is an essential precursor to the broad protection given to publication.[16] "[W]ithout some protection for seeking out the news, freedom of

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10. When a public figure plaintiff seeks damages resulting from publication of speech protected by the First Amendment, the plaintiff must also satisfy the actual malice standard from the *Sullivan* case. *See* Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988).

11. 420 U.S. 469 (1975).

12. *Id.* at 496.

13. 491 U.S. 524, 541 (1989).

14. *See id.* at 538-39.

15. Branzburg v. Hayes, 408 U.S. 665, 707 (1972).

16. *Id.* at 681; *see also* Houchins v. KQED, Inc., 438 U.S. 1, 32 (1978) (Stevens, J., dissenting).

> Without some protection for the acquisition of information about operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance.
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> . . . .
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> . . . [I]nformation gathering is entitled to some measure of constitutional protection. . . . [T]his protection is not for the private benefit of those who might qualify as representatives of the "press" but to insure that the citizens are fully informed regarding matters of public interest and importance.

Id. at 32.

the press could be eviscerated."[17] However, the Court immediately limited the newsgathering protection by stating that "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."[18] Publishers do not have "special immunity from the application of general laws" or "special privilege to invade the rights and liberties of others."[19]

Branzburg thus set forth an internal contradiction: newsgathering merits some constitutional protection, but the press is subject to the same laws that apply to all citizens, regardless of how such laws may burden the newsgathering process.[20] The media receives some immunity when publishing the news because the publication is constitutionally protected.[21] If there is a constitutional protection for gathering the news, does it not follow that the media should also receive some immunity while newsgathering? The lower courts have struggled to interpret the conflicting principles of *Branzburg*, and the level of constitutional protection extended to newsgathering remains unsettled. Two approaches to the problem have emerged.

1. First Approach: Remove First Amendment From Analysis.—When determining whether media outlets are liable for torts as a result of newsgathering activities, some courts refuse to weigh any First Amendment interests. *Dietemann v. Time, Inc.*,[22] handed down shortly before *Branzburg*, is a classic example of this approach.[23] In *Dietemann*, two reporters from Life Magazine used false identities to gain access to the office portion of the home of a man practicing herbal medicine.[24] The "quack" doctor was a disabled veteran with little education who engaged in the practice of healing with clay, minerals, and herbs.[25] While one of the reporters posed as a patient, the other reporter used a hidden camera to photograph the man attempting to heal with some gadgets and a wand.[26] The Ninth Circuit did not allow the First Amendment to shield the reporters from an invasion of privacy claim.[27] In a widely cited passage, the court found that the man could reasonably expect to be free of eavesdropping newsmen in the den of his home.[28] "The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass,

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17. *Branzburg*, 408 U.S. at 681.
18. *Id.* at 682.
19. *Id.* at 683 (quoting Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937)).
20. *See* Lyrissa Barnett Lidsky, *Prying, Spying and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 186-87 (1998).
21. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).
22. 449 F.2d 245 (9th Cir. 1971).
23. *See* Lidsky, *supra* note 20, at 190.
24. *See Dietemann*, 449 F.2d at 246.
25. *See id.* at 245.
26. *See id.* at 246.
27. *See id.* at 249.
28. *See id.*

to steal, or to intrude by electronic means into the precincts of another's home or office."[29]

Dietemann dulled the media's First Amendment sword by proclaiming that reporters should be subject to tort law to the same extent as other citizens, regardless of its affect on newsgathering.[30] In the process, the court laid the foundation for the invasion of privacy cases against the media which followed. Nevertheless, some courts followed a different approach to determine the constitutional protection afforded to newsgathering.

2. Second Approach: First Amendment Limits Reach of State Tort Law.— Some courts found support in *Branzburg* for the opposite position—that the First Amendment limits states' ability to sanction intrusive newsgathering.[31] Freedom of the press is a "fundamental principle of the American form of government"[32] and with it comes the risk of the press acting outside its boundaries. The risks associated with a free press were recognized as early as the Constitutional debates when James Madison said, "[s]ome degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press."[33] In the face of invasion of privacy claims, courts have held that the First Amendment protects the broadcast of an incriminating video of a well-known physician even though the video was fraudulently obtained by television reporters;[34] it protects a newspaper that published a photograph of a woman's bare breast obtained from unsealed court records;[35] it even protects the publication of a photograph of a dead woman obtained during a customary media

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29. *Id.* The Second Circuit agreed when it held a free-lance photographer liable for invasion of privacy for unceasingly shadowing Jacqueline Onassis and her children in pursuit of photographs. *See* Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973). The *Galella* court concluded that the First Amendment does not immunize all conduct designed to gather information about a public figure. *See id.* at 995-96.

30. One court has even found a television news crew guilty of criminal charges. *See* State v. Krueger, 975 P.2d 489, 498 (Utah Ct. App. 1999) (finding that by asking minors to chew tobacco on camera to illustrate a story, the news crew "stepped beyond the protections of the First Amendment").

31. *See* Lidsky, *supra* note 20, at 191-92; *see also* Houchins v. KQED, Inc., 438 U.S. 1 (1978). "[T]erms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see." *Id.* at 17.

32. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 275 (1964).

33. *Id.* at 271 (quoting 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 571 (1876)).

34. *See In re* King World Prods., Inc., 898 F.2d 56, 59 (6th Cir. 1990) (Physicians secretly videotaped by *Inside Edition* reporters failed to show requisite harm to justify prior restraint of producer's First Amendment freedom to broadcast the video, even if fraudulently obtained. "No matter how inappropriate the acquisition, or its correctness, the right to disseminate that information is what the Constitution intended to protect.").

35. *See* Munoz v. Am. Lawyer Media, 512 S.E.2d 347 (Ga. Ct. App. 1999), *cert. denied.*, No. S99C0794, 1999 Ga. LEXIS 546 (Ga. June 3, 1999).

walk-through with fire officials but without the consent of her family.[36] These cases support the notion that the First Amendment shields the press from liability when reporters use routine reporting techniques to obtain truthful information.[37]

The most noted example of this approach is *Desnick v. American Broadcasting Cos.*[38] In an effort to uncover fraudulent practices in an eye clinic, reporters from *PrimeTime Live* equipped "test patients" with hidden cameras.[39] The patients filmed their eye exams and conversations with clinic doctors, which were later aired in a segment about doctors who perform unnecessary cataract surgery for the money.[40] In denying recovery for the clinic's trespass and invasion of privacy claims, the court noted the importance of the First Amendment even when the investigative tactics are "surreptitious, confrontational, unscrupulous, and ungentlemanly."[41]

> Today's "tabloid" style investigative television reportage, conducted by networks desperate for viewers in an increasingly competitive television market constitutes—although it is often shrill, one-sided, and offensive, and sometimes defamatory—an important part of the market. It is entitled to all the safeguards with which the Supreme Court has surrounded liability for defamation.[42]

Branzburg and the lower court decisions that followed drew a blurry line in the sand for journalists. Newsgathering is constitutionally protected, but to what extent? The question remains unresolved, but the U.S. Supreme Court sharpened the focus of that line in the summer of 1999.

II. SUPREME COURT'S FADING TOLERANCE OF INTRUSIVE NEWSGATHERING

In the early morning hours of April 16, 1992, officers gathered outside the home of Charles and Geraldine Wilson to prepare to execute an arrest warrant on the Wilson's son, Dominic.[43] A reporter and photographer from the *Washington Post* accompanied the officers as part of the U.S. Marshal's Service ride-along policy. Charles Wilson, still in bed when he heard the officers in his living room, ran into the room in his underwear and demanded to know what was happening. Believing Charles to be Dominic, the officers subdued him by pushing him to the floor as Geraldine entered in her nightgown. The *Post* photographer took

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36. Fla. Publ'g Co. v. Fletcher, 340 So. 2d 914 (Fla. 1977) (ruling that plaintiff could not recover for publication of a photograph of the silhouette of her daughter who died in a fire under theory of trespass because consent was implied by custom authorizing news media to accompany fire officers in the investigation of fires).

37. *See* Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979)

38. Desnick v. Am. Broad. Cos., 44 F.3d 1345 (7th Cir. 1995).

39. *Id.* at 1348.

40. *See id.*

41. *Id.* at 1355.

42. *Id.* (internal citations omitted).

43. *See* Wilson v. Layne, 526 U.S. 603, 607 (1999).

numerous pictures during the incident, but none were published. The officers and journalists left after realizing Dominic was not inside the house.[44]

The Wilsons sued the officers in their personal capacities claiming the officers, in allowing the reporter and photographer into the Wilson's home without their consent, violated the Wilson's Fourth Amendment rights.[45] The Court found that "although the presence of third parties during the execution of a warrant may in some circumstances be constitutionally permissible . . . the presence of these third parties was not."[46] Although the Court recognized the undeveloped state of the law, it granted the officers qualified immunity because the right to not have the media enter a home with police was not clearly established at the time of the incident.[47] In making this finding, the Court noted that the U.S. Marshal's ride-along policy explicitly allowed media to enter private homes during the execution of warrants[48] and the law among the lower courts was unsettled.[49]

A. Implications of Wilson *for the Media*

Although the police, not the media, were the defendants in *Wilson*, a diminishing tolerance for intrusive newsgathering behavior may be inferred. The Court recognized the importance of an individual's home as his "castle," where he has the highest expectation of a right to privacy.[50] The Fourth Amendment embodies this principle:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[51]

The officers were authorized to enter the Wilsons' home because they had a warrant, but the Court noted that it does not necessarily follow that the officers were entitled to bring journalists along.[52]

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44. *See id.*

45. *See id.* at 608.

46. *Id.* at 613 (internal citation omitted); *see also* Hanlon v. Berger, 526 U.S. 808 (1999) (companion case with similar facts and identical holding).

47. *See Wilson*, 526 U.S. at 608, 617-18.

48. *See id.* at 613.

49. *See* Stack v. Killian, 96 F.3d 159 (6th Cir. 1996); Parker v. Boyer, 93 F.3d 445 (8th Cir. 1996) (both cases holding that officers who allowed media to ride along were entitled to qualified immunity). *But cf.* Barrett v. Outlet Broad., Inc., 22 F. Supp. 2d 726 (S.D. Ohio 1997); Ayeni v. CBS, Inc., 848 F. Supp. 362 (E.D.N.Y. 1994) (both cases holding that officers who allowed media to ride along were not entitled to qualified immunity).

50. *See Wilson*, 526 U.S. at 609-10.

51. U.S. CONST. amend. IV.

52. *See Wilson*, 526 U.S. at 611.

Media ride-along policies allow civilian observers to accompany police officers while the officers perform their duties. Ride-alongs have become a common activity for journalists and are thought to serve important objectives for both the police agency and the media outlet. These objectives include: (1) publicizing the government's efforts to combat crime, (2) facilitating accurate reporting on law enforcement activities, (3) protecting the suspects by minimizing police abuses, and (4) protecting the safety of the officers.[53] But these objectives, though important, do not override the right of residential privacy.[54] "Were such generalized 'law enforcement objectives' themselves sufficient to trump the Fourth Amendment, the protections guaranteed by that Amendment's text would be significantly watered down."[55]

Although the Court recognized the importance of the First Amendment in protecting freedom of the press, it found that the Fourth Amendment's protection of the home as the ultimate zone of privacy outweighed the First Amendment in the narrow sense of police ride-alongs.[56] The core of *Wilson* is the idea that an action by state actors and the media that reaches into one's home is an intrusive offense against that person's privacy. By not allowing journalists to enter a private residence "on the coattails" of a police warrant, the Court reined in a longstanding media practice and revealed some distaste for newsgathering that interferes with the individual's right to privacy.

Wilson marks one of the few times since *Branzburg* that the Supreme Court has spoken about the scope of the constitutional protection for newsgathering. During the scuffle in the Wilson's living room, the *Washington Post* photographer took numerous photographs. But the Court noted that none of the photographs were published.[57] At issue was the *way* the reporter got the photographs, not what was done with them later. Had the pictures been published, the newspaper may have been protected under *Sullivan*.[58] But its newsgathering method—riding along with police—was not protected.[59] The Court seems to be saying that it is growing tired of intrusive newsgathering behavior and will no longer allow the media to hide behind the shield of the First Amendment, at least in these narrow circumstances. But how far can *Wilson* be taken?

Although *Wilson* does not mention the tort of intrusion upon seclusion, increased liability for intrusive newsgathering by the media is a logical outgrowth of the strong right to privacy sentiment underlying the opinion. If police entry with a warrant is an "authorized intrusion"[60] as stated in *Wilson*, it follows that media entry is an unauthorized intrusion. Eliminating ride-alongs during the

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53. *See id.* at 612-13.
54. *See id.* at 613-14.
55. *Id.* at 612.
56. *See id.* at 612-13.
57. *See id.* at 608.
58. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).
59. *See Wilson*, 526 U.S. at 611.
60. *Id.*

execution of a warrant is a sign of the Supreme Court's diminishing tolerance for the media's intrusive behavior. Not only will *Wilson* impair popular reality television shows that rely on police ride-alongs,[61] it stands to open the door for new invasion of privacy suits against the media based on the tort of intrusion.

III. INVIGORATING THE TORT OF INTRUSION UPON SECLUSION

The tort of intrusion upon seclusion transcends trespass actions and protects a broad sphere of privacy by filling the gaps left by trespass, nuisance, and intentional infliction of emotional distress.[62] The tort extends beyond the physical intrusion so long as the intruded-upon event is, and is entitled to be, private.[63] Most courts have adopted the Restatement's explanation of the tort of intrusion.[64]

The Restatement (Second) of Torts states that "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[65] Comment b further notes that "[t]he invasion may be . . . by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires."[66]

Non-media applications of intrusion have covered a broad range of offensive activities that encroach on a person's privacy. The classic illustration of intrusion arose from a case decided decades before the courts recognized the tort. In *De May v. Roberts*,[67] the court awarded damages against a person who intruded into a place where a woman was giving birth under the guise of being the physician's assistant.[68] Modern cases reflect *De May's* protection of personal privacy, finding liability for harassing phone calls by a creditor to a debtor at

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61. *COPS*, for example, is in its twelfth season and is syndicated to more than ninety percent of the U.S. market. "[T]he series has profiled more than 120 law enforcement agencies in 140 different cities and countries." Ronald B. Kowalczyk, Comment, *Supreme Court Slams the Door on the Press: Media "Ride-Along" Found Unconstitutional in* Wilson v. Layne, 9 DEPAUL-LCA J. ART & ENT. L. & POL'Y 353, 353 (1999).

62. *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 392 (1960).

63. *Id.* at 391.

64. *See generally* Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668, 678 (Cal. Ct. App. 1986); Benitez v. KFC Nat'l Mgmt. Co., 714 N.E.2d 1002, 1006 (Ill. App. Ct. 1999); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998); Household Credit Servs., Inc. v. Driscol, 989 S.W.2d 72, 84-85 (Tex. App. 1998).

65. RESTATEMENT (SECOND) OF TORTS § 652B (1965).

66. *Id.* cmt. b.

67. 9 N.W. 146 (Mich. 1881).

68. *See id.* at 149.

home and work,[69] spying on women in the bathroom of a fast-food restaurant,[70] circulating nude photographs after film was dropped off for developing,[71] and performing an HIV blood test without permission.[72]

Today, nearly every state recognizes the tort of intrusion,[73] but it has been a "toothless" tort against media defendants with few cases making it past the hurdle of summary judgment. In fact, between 1986 and 1996 defendants prevailed on summary judgment motions in intrusion cases nearly ninety percent of the time.[74] One possible explanation for the dismal success rate of media intrusion suits is "kitchen sink" pleading.[75] Because intrusion is so broad, plaintiffs tend to plead it along with a host of other tort theories in hopes that one will succeed.[76] But unlike other privacy torts, the tort of intrusion is ideally suited to address intrusive newsgathering because it targets offensive behavior without raising First Amendment difficulties.[77] Intrusion focuses on the methods used to gather information rather than on the publication of it.[78] Thus, the plaintiff is relieved of the task of proving the tort withstands the constitutional scrutiny applied to publication-based torts.[79] The tort of intrusion can be successfully applied to the media, as shown in some jurisdictions that are redesigning the tort to address egregious media wrongs.[80]

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69. *See* Household Credit Servs. v. Driscol, 989 S.W.2d 72 (Tex. App. 1998).

70. *See* Benitez v. KFC Nat'l Mgmt. Co., 714 N.E.2d 1002 (Ill. App. Ct. 1999).

71. *See* Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231 (Minn. 1998).

72. *See* Doe v. High-Tech Inst., Inc., 972 P.2d 1060 (Colo. Ct. App. 1998).

73. As of 1996, one author found that six states did not recognized the tort of intrusion. *See* Dennis F. Hernandez, *Litigating the Right to Privacy: A Survey of Current Issues*, 446 PRAC. LAW INST. 425, 437 (1996). Illinois and Minnesota expressly recognized the tort in the past year. *See Benitez*, 714 N.E.2d at 1007; *Lake*, 582 N.W.2d at 235.

74. *See* Lidsky, *supra* note 20, at 207.

75. *Id.* at 208.

76. *See id.*

77. *See* Melville B. Nimmer, *The Right to Speak from* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 957 (1968). The privacy tort of public disclosure of private facts has a difficult First Amendment standard to meet. If the information is truthful, lawfully obtained, and deemed "newsworthy," no liability may be imposed for publishing or broadcasting the information. *See* Florida Star v. B.J.F., 491 U.S. 524 (1989).

78. *See* RESTATEMENT (SECOND) OF TORTS § 652B, cmt. b (1965).

79. *See generally* Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

80. *See generally* Sanders v. Am. Broad. Cos., 978 P.2d 67 (Cal. 1999), *review denied*, No. S059692, 2000 Cal. LEXIS 1892 (Cal. Mar. 15, 2000); Shulman v. Group W Prods., Inc., 955 P.2d 469 (Cal. 1998); Marich v. QRZ Media, Inc., 86 Cal. Rptr. 2d 406 (Cal. Ct. App. 1999), *review denied*, No. S081294, 1999 Cal. LEXIS 7291 (Cal. Oct. 22, 1999) (unpublished opinion); Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668 (Cal. Ct. App. 1986).

A. Tweaking the Tort of Intrusion to Fit Media Applications

Shortly before *Wilson*, California courts began to recognize intrusion as a valuable tool to sanction the media for offensive newsgathering tactics, a significant step for the capital of the entertainment industry.[81] Two post-*Wilson* decisions from California strengthened the framework of the tort's application to the media.[82] In building this framework, California state courts have found intrusion when a reality TV show equipped a nurse in a rescue helicopter with a microphone to record her conversation with a car accident victim,[83] when a television news crew filmed paramedics administering life-saving techniques to a dying man in his bedroom,[84] and when a television news magazine reporter posed as an employee of a psychic telephone network and used a hidden camera to uncover fraudulent practices.[85]

The Restatement offers a two-prong test for intrusion: (1) intrusion into a private place, conversation or matter that (2) is highly offensive to a reasonable person.[86] Starting with this test, courts have retrofit the tort to reflect the intricacies of today's world of high-tech media. In the first prong of the test, courts have expanded the meaning of the word "private" and created an exception for intrusions with consent to better address the use of surreptitious surveillance for investigative reporting. An intrusion need not be a physical invasion; it includes the use of electronic means to oversee or overhear that which is meant to be private.[87] So it appears that the difference between whether a media tactic will be deemed intrusive or not is often the degree of privacy the individual could have reasonably expected during the activity.

Typically intrusion cases would fail where the intruded-upon event took place in public.[88] "On the public street, or in any other public place, the plaintiff has no right to be alone . . . ."[89] This traditional interpretation of the tort limited its application to intrusions into strictly private areas. A person visible to the public eye was not "secluded" and therefore could not claim "intrusion upon seclusion." But with the advent of miniature cameras and microphones that can record conversations up to sixty yards away, under the traditional interpretation an individual's right to privacy would be shattered upon leaving his home.

To protect individuals from intrusive media behavior in semi-public places,

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81. *See Shulman*, 955 P.2d at 469; *Miller*, 232 Cal. Rptr. at 668.

82. *See Sanders*, 978 P.2d at 67; *Marich*, 86 Cal. Rptr. 2d at 406; *see also infra* Part IV.

83. *See Shulman*, 955 P.2d at 469.

84. *See Miller*, 232 Cal. Rptr. at 689.

85. *See Sanders*, 978 P.2d at 67.

86. RESTATEMENT (SECOND) OF TORTS § 652B (1965).

87. *See id.* at cmt. b.

88. *See id.* at cmt. c; *see also* Wehling v. Columbia Broad. Sys., 721 F.2d 506, 509 (5th Cir. 1983); Frazier v. S.E. Pa. Transp. Auth., 907 F. Supp. 116, 122 (E.D. Pa. 1995); Machleder v. Diaz, 538 F. Supp. 1364, 1374 (S.D.N.Y. 1982); Fogel v. Forbes, Inc., 500 F. Supp. 1081, 1087 (E.D. Pa. 1980); Aisenson v. Am. Broad. Co., 269 Cal. Rptr. 379, 388 (Cal. Ct. App. 1990).

89. Prosser, *supra* note 62, at 391.

a flexible interpretation of the word "privacy" became necessary. Courts recognized this necessity in modern media intrusion cases and have held that an expectation of *complete* privacy is not necessary to sustain an action for intrusion.[90] "[P]rivacy, for purposes of the intrusion tort, is not a binary, all-or-nothing characteristic. There are degrees and nuances . . . of privacy: the fact the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law."[91]

By expanding the tort to cover intrusions into areas with lesser expectations of privacy, courts are better equipped to sanction the media for high-tech newsgathering practices that previously were not considered intrusive. While this expansion will be helpful to target egregious media tactics, the same case law will be available to attack legitimate newsgathering driven by a great public interest. Once again courts will be asked to strike a balance between individuals' right to privacy and the rights of the press.

That balance seems to be shifting in favor of individuals' right to privacy as courts continue to expand the reach of intrusion. For example, courts have found that individuals possess a limited right to privacy in public places, such as a restaurant[92] or the workplace[93] where, although open to the public, the atmosphere is private.

> In an office or other workplace to which the general public does not have unfettered access, employees may enjoy a limited, but legitimate, expectation that their conversations and other interactions will not be secretly videotaped by undercover television reporters, even though those conversations may not have been completely private from the participants' coworkers.[94]

Moreover, "[c]onduct that amounts to a persistent course of hounding, harassment and unreasonable surveillance, even if conducted in a public or semi-public place, may nevertheless rise to the level of" intrusion.[95] One court even

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90. *See* Sanders v. Am. Broad. Cos., 978 P.2d 67, 69 (Cal. 1999), *review denied*, No. S059692, 2000 Cal. LEXIS 1892 (Mar. 15, 2000).

91. *Id.* at 72.

92. *See* Stessman v. Am. Black Hawk Broad. Co., 416 N.W.2d 685, 687-88 (Iowa 1987) (videotaping of a woman eating in a private dining room of a restaurant after she repeatedly asked them to stop states a claim for intrusion); *cf.* Simtel Comm. v. Nat'l Broad. Co., 84 Cal. Rptr. 2d 329, 336 (Cal. Ct. App. 1999) (videotaping of business meeting by *Dateline NBC* reporters on the patio of a crowded restaurant was not an intrusion into a private place, conversation or matter), *review denied sub nom.* Wilkens v. Nat'l Broad. Co., No. S079583, 1999 Cal. LEXIS 4884 (Cal. July 21, 1999).

93. *See Sanders*, 978 P.2d at 69.

94. *Id.*

95. Wolfson v. Lewis, 924 F. Supp. 1413, 1420 (E.D. Pa. 1996). The Restatement recognizes that repeated conduct that "amount[s] to a 'course of hounding the plaintiff, [and] becomes a substantial burden to his existence' may constitute an invasion of privacy." *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 652B, cmt. b (1977)).

left open the possibility of "photographic intrusions" by way of recording private moments and broadcasting them into a family member's home—the transmission itself being the intrusive act.[96]

Although courts tightened the reins over the media by recognizing limited privacy rights, the court also loosened the reins by proclaiming that consent bars an intrusion claim, even if fraudulently induced.[97] In *Baugh v. CBS, Inc.*, reporters from the television program *Street Stories* accompanied police officers on a domestic dispute call.[98] The officers told the homeowners that the reporters were from the D.A.'s office and were there to help them.[99] The homeowners then allowed the reporters to enter the home and begin filming.[100] The court dismissed the homeowners' intrusion claim because homeowner consent, although fraudulently induced, precludes recovery under intrusion.[101] "No California cases indicate that the consent must be knowing or meaningful and the Court does not find any reason to add that requirement to the tort. . . . [C]onsent is an absolute defense, even if improperly induced."[102] If consent is given to the media in any form or for any reason, the individual will not have a claim for intrusion.[103]

The second prong of the intrusion test requires that the "intrusion be highly offensive to a reasonable person."[104] Noting a lack of case law to assist courts in determining the "offensiveness" of an intrusion by the media, the court in *Miller v. National Broadcasting Co.* delineated five factors to be considered: (1) degree of intrusion; (2) context, conduct and circumstances surrounding the intrusion; (3) intruder's motives and objectives; (4) setting into which he intrudes; and (5) expectations of those whose privacy is invaded.[105] Taking these

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96. Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668, 682 (Cal. Ct. App. 1986).

97. *See* Baugh v. CBS, Inc., 828 F. Supp. 745, 757 (N.D. Cal. 1993).

98. *Id.* at 750.

99. *See id.* at 751.

100. *See id.*

101. *See id.* at 757.

102. *Id.*

103. *See id.*; *see also* Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., 30 F. Supp. 2d 1182, 1189-91 (D. Ariz. 1998) (holding that *PrimeTime Live* reporter's use of false pretenses to enter medical clinic and secretly videotape a conversation does not give rise to intrusion claim); Reeves v. Fox Television Network, 983 F. Supp. 703, 713 (N.D. Ohio 1997) (holding that a homeowner who willingly allowed police officers and a camera crew inside his home is barred from later claiming intrusion after learning the crew was from the television program *COPS*); *cf.* Copeland v. Hubbard Broad. Inc., 526 N.W.2d 402, 405 (Minn. Ct. App. 1995) (holding homeowners' consent to allow veterinary student to accompany a veterinarian into a home to treat an animal did not amount to consent for the student to secretly videotape the visit).

104. RESTATEMENT (SECOND) OF TORTS § 652B (1965).

105. Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668, 679 (Cal. Ct. App. 1986). The court points out that the lack of "offensiveness" case law is attributable to the fact that "most individuals not acting in some clearly identified official capacity do not go into private homes without the consent of those living there; not only do widely held notions of decency preclude it, but most individuals understand that to do so is either a tort, a crime, or both." *Id.* at 678-79 (footnote

factors into consideration, the *Miller* court concluded that the test is whether a reasonable person could regard the media's conduct as highly offensive.[106] In *Miller*, an NBC camera crew entered the bedroom of a man having a heart attack to film the paramedics' attempt to save him.[107] The camera crew had neither the consent of the man nor his wife.[108] The court found this intrusion highly offensive.[109] The court noted that at a time of confusion and vulnerability, NBC showed a lack of restraint and sensitivity by disregarding the Millers' right of privacy.[110]

The *Miller* factors for offensiveness were applied in a similar California media intrusion case a few years later. In *Shulman v. Group W Productions, Inc.*, an accident victim successfully brought a claim for intrusion against a reality television program that filmed her rescue.[111] Before seeing the segment of *On Scene: Emergency Response*, the only memory Ruth Shulman had of the accident that left her a paraplegic was waking up in intensive care.[112] The program showed Shulman pinned inside her family's overturned car, moaning in pain and begging to know if her children were alive.[113] At one point she even urged the paramedic to let her die.[114] The paramedic wore a mini-microphone, and cameramen recorded the accident scene on the ground and inside the rescue helicopter.[115] Although the court recognized that the camera crew's mere presence at the scene and filming of the events occurring on the ground were not an intrusion upon Shulman's seclusion, it found the crew went too far by equipping the paramedic with a microphone and riding in the helicopter.[116]

> [W]e are aware of no law or custom permitting the press to ride in ambulances or enter hospital rooms during treatment without the patient's consent.
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> . . . .
>
> . . . Ruth was entitled to a degree of privacy in her conversations with [the paramedic].
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omitted).

106. *See id.* at 679.

107. *See id.* at 673.

108. *See id.*

109. *See id.* at 679; *cf.* Deteresa v. Am. Broad. Cos., 121 F.3d 460, 466 (9th Cir. 1997) (surreptitious taping of woman standing on her front porch while she was refusing to do an on-camera interview was not sufficiently offensive to support an intrusion claim).

110. *See Miller*, 232 Cal. Rptr. at 679.

111. 955 P.2d 469 (Cal. 1998).

112. *See* Maura Dolan, *The Right to Know vs. the Right to Privacy*, L.A. TIMES, Aug. 1, 1997, at A1.

113. *See id.*

114. *See id.*

115. *See id.*

116. *See Shulman*, 955 P.2d at 490-91.

> . . . [T]he last thing an injured accident victim should have to worry about while being pried from her wrecked car is that a television producer may be recording everything she says to medical personnel for the possible edification and entertainment of casual television viewers.[117]

The court concluded the camera crew acted with "highly offensive disrespect" for Shulman.[118] Furthermore, their motive to gather newsworthy information did not justify placing a microphone on the paramedic or filming inside the helicopter.[119]

But *Shulman* also carved out an exception for the offensiveness prong of the intrusion test: the level of offensiveness may be mitigated by the social utility of the intruders' objections.[120] The court recognized that the constitutional protection of the press reflects the "strong societal interest in effective and complete reporting of events," and therefore, actions that normally would qualify as an intrusion as a matter of tort law may be justified for journalists.[121] "Information-collecting techniques that may be highly offensive when done for socially unprotected reasons—for purposes of harassment, blackmail or prurient curiosity, for example—may not be offensive to a reasonable person when employed by journalists in pursuit of a socially or politically important story."[122]

One may imagine a scenario, such as a routine interview, that is clearly not an intrusion and a scenario involving wire-tapping a personal telephone line, that probably is an intrusion. However, a problem lies in the area between these extremes. Miniature cameras and high-power microphones are powerful investigative tools for reporters, but they also have the potential to severely threaten privacy.[123] The redesigned tort of intrusion may be successful against egregious uses of this technology but will also expose legitimate media investigations to liability.

The application of intrusion tort law to the media is still evolving and courts generally examine the facts on a case-by-case basis. However, a framework is taking shape. The intrusion no longer needs to be into a strictly private place, it may be in a semi-public place such as a restaurant or office. The intrusion may be through high-powered microphones and miniature cameras, rather than the physical presence of an individual. Now, together with support inferred from the

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117. *Id.* at 490-91, 494 (citations omitted).

118. *Id.* at 494-95.

119. *See id.*

120. *See id.* at 493; *see, e.g.*, Wilcher v. City of Wilmington, 60 F. Supp. 2d 298, 304-05 (D. Del. 1999) (requiring that a firefighter urinate while under observation to avoid cheating on a drug test was not sufficiently offensive to constitute an invasion of privacy). "A reasonable person would recognize the importance of drug testing, particularly among firefighters who confront dangerous circumstances to save the lives and property of others." *Id.* at 304.

121. *Shulman*, 955 P.2d at 493.

122. *Id.*

123. *See id.*

U.S. Supreme Court in *Wilson*,[124] the newly invigorated tort of intrusion is prepared to sustain claims against the modern media.

IV. POST-WILSON: A NEW ERA FOR INTRUSION?

Since *Wilson*, two California courts have handed down decisions finding media outlets liable for intrusion, thereby strengthening the tort's framework.[125] In *Sanders v. American Broadcasting Cos.*, a *PrimeTime Live* reporter obtained employment in the Los Angeles office of the Psychic Marketing Group as part of an investigation of psychic phone lines.[126] When she was not giving psychic phone readings, the reporter secretly recorded conversations with co-workers with a small camera hidden in her hat and a microphone attached to her brassiere.[127] Each conversation took place in office cubicles that were enclosed on three sides and separated by partitions.

Sanders raised the issue of whether a person who lacks a reasonable expectation of privacy in a conversation because it could be seen and overheard by co-workers can state a claim for invasion of privacy when that conversation is secretly recorded.[128] In reversing the California Court of Appeals, the California Supreme Court recognized this expectation of limited privacy as reasonable.[129] "[T]he cause of action is not defeated as a matter of law simply because the events or conversations upon which the defendant allegedly intruded were not completely private from all other eyes and ears."[130] The decision in *Sanders* explicitly recognized an expectation of limited privacy in a semi-public place for the purposes of privacy torts, thus changing the face of intrusion.[131] By not requiring the intrusion to disturb a strictly private place, *Sanders* effectively removed the "seclusion" from intrusion upon seclusion, expanding the tort for application to semi-public places where "the general public does not have

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124. Wilson v. Layne, 526 U.S. 603 (1999).

125. *See* Sanders v. Am. Broad. Cos., 978 P.2d 67 (Cal. 1999), *review denied*, No. S059622, 2000 Cal. LEXIS 1892 (Cal. Mar. 15, 2000); Marich v. QRZ Media, 86 Cal. Rptr. 2d 406 (Cal. Ct. App. 1999), *review denied*, No. S081294, 1999 Cal. LEXIS 7291 (Cal. Oct. 22, 1999) (unpublished opinion).

126. *See Sanders*, 978 P.2d at 69-70.

127. *See id.* at 70.

128. *See id.* at 71.

129. *See id.* at 77.

130. *Id.* at 69. The television network, however, was exempted from liability in the federal wiretapping suit based on the same facts. *See* Sussman v. Am. Broad. Cos., 186 F.3d 1200 (9th Cir. 1999), *cert. denied*, 528 U.S. 1131 (2000). "Although ABC's taping may well have been a tortious invasion of privacy under state law, plaintiffs have produced no probative evidence that ABC had an illegal or tortious purpose when it made the tape." *Id.* at 1203.

131. *See, e.g.*, Machleder v. Diaz, 538 F. Supp. 1364, 1374 (S.D.N.Y. 1982) (holding a television reporter not liable for intrusion for an interview conducted outside company's headquarters because it was filmed in a semi-public area where the parties to the interview were visible to the public eye).

unfettered access."[132]

Sanders came three years after *Russell v. American Broadcasting Co.*, a similar case also involving a *Prime Time Live* investigation with the opposite courtroom result.[133] In that case, the reporter secured a job at Potash Brothers, a retail grocery store in Chicago, to uncover sanitation problems in the commercial fish industry.[134] The reporter wore a hidden camera and microphone to record conversations with co-workers that revealed questionable handling of fish sold at Potash.[135] Though at the time Illinois did not recognize the tort of intrusion, the court stated that even if such an action was available, Potash would not recover.[136] "[T]he core of this tort is the offensive prying into the private domain of another. . . . [P]laintiff alleges that defendants secretly recorded a conversation she willingly had with a co-worker at her place of business. This is hardly 'offensive prying into the private domain of another.'"[137] The fact pattern is nearly identical to *Sanders*; however, this covert workplace recording three years earlier was held not to be an offensive intrusion.[138] The opposing results indicate courts are becoming less tolerant of intrusive newsgathering techniques and are molding the tort of intrusion into a viable claim against intrusive media. With its connection to the entertainment industry, it is particularly significant that the courts of California are leading the way.

Less than two weeks after the California Supreme Court decided *Sanders*, the California Court of Appeals followed its lead in *Marich v. QRZ Media, Inc.*[139] In *Marich*, reporters from *LAPD: Life On The Beat* accompanied police officers on a call by an apartment manager who found the body of a tenant.[140] The camera crew filmed the inside of the apartment showing Michael Marich hunched over on the floor, dead of an apparent drug overdose. Based upon a job application found in the apartment, police determined Marich was an actor and speculated that he accidentally killed himself while celebrating a success. The police called his parents from the apartment while the camera crew was still taping.[141] Although the Marichs' responses were unintelligible, they clearly projected shock and anguish. The entire incident was taped and later shown as a four-minute segment on the television program.[142]

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132. *Sanders*, 978 P.2d at 69.

133. Russell v. Am. Broad. Co., No. 99-C-5768, 1995 WL 330920, at *1 (N.D. Ill., May 30, 1995).

134. *See id.*

135. *See id.*

136. *See id.* at *7-8.

137. *Id.* at *8 (quoting RESTATEMENT (SECOND) OF TORTS § 652B (1977) (internal citation omitted)).

138. *See id.*

139. Marich v. QRZ Media, Inc., 86 Cal. Rptr. 2d 406 (Cal. Ct. App. 1999), *review denied*, No. S081294, 1999 Cal. LEXIS 7291 (Cal. Oct. 22, 1999) (unpublished decision).

140. *See id.* at 412.

141. *See id.* at 413.

142. *See id.* at 412-13.

The Marichs sued for invasion of privacy by intrusion. After citing *Wilson* and *Sanders* as confirming "the right of privacy from inappropriate media intrusion," the court held QRZ Media liable for intrusion.[143] The phone call made to the parents and recorded without their consent triggered the claim.[144] Though the conversation was not completely private, the Marichs could have reasonably expected a third party would not record the call for broadcast on a nationally syndicated television program; therefore, their privacy was invaded.[145] The call was deemed "highly offensive" even though the actual words spoken by the Marichs could not be discerned.[146] The court found that the fact their words were not understood did not detract from the highly personal and agonizing circumstances of the call.[147]

Sanders and *Marich* turned on the concept of the right to limited privacy in a semi-public situation. By finding an actionable intrusion without seclusion, these two courts expanded the tort in a way that could prove fatal to media defendants in the future. Of course, there is a line to be drawn—the media should not be permitted to commit crimes such as breaking and entering in the process of getting a story.[148] By expanding the tort of intrusion, courts will chill investigative reporting into areas like the workplace in *Sanders*.

Though seldom successful in the past, intrusion claims against the media are gaining favor in American courtrooms. California courts took the lead in *Miller* and continue to pave the way for media liability with decisions like *Sanders* and *Marich*.[149] Now, the state is finding support from the U.S. Supreme Court in *Wilson* and *Hanlon*. With a framework of solid precedent in place, other states will likely follow. But too much judicial control over the media could have far-reaching and unintended consequences.

V. The Slippery Slope of Controlling the Press

In 1991, *20/20* reporters went undercover to expose abuses in Texas nursing homes.[150] Graphic footage of residents tied to their beds, starving and lying in filth, spurred public outrage and prompted reform in the Texas legislature.[151] *PrimeTime Live* reporters uncovered patient abuse at a VA hospital, which led to reform.[152] Reporters from the *Chicago Sun-Times* used undercover techniques

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143. *Id.* at 409.

144. *See id.* at 419.

145. *See id.*

146. *See id.*

147. *See id.*

148. *See* Branzburg v. Hayes, 408 U.S. 665 (1972).

149. *See also* Cohen v. Cowles Media Co., 501 U.S. 663, 671 (1991) (finding newspaper liable for revealing the identity of a confidential source in its article).

150. *See* Lidsky, *supra* note 20, at 218.

151. *See id.*

152. *See* Ginia Bellafante, *Hide and Go Sue: Will Food Lion's Lawsuit Against* PrimeTime Live *Squelch TV's Aggressive Undercover Reporters?*, TIME, Jan. 13, 1997, at 81.

to expose clinics that performed costly abortions on women who were not pregnant.[153] These were investigative projects of great public concern where it seemed unlikely any plaintiff would bring suit; or if one did sue, that any court would find the news organization liable for its newsgathering technique because of the investigation's social utility.[154] But what about this scenario: A television news reporter goes undercover in a supermarket, revealing unsanitary food handling practices such as grinding expired beef with fresh beef and applying barbecue sauce to expired chicken to mask the smell, then selling it as "gourmet" food.[155] Is this public service or questionable newsgathering?

That was the scenario in *Food Lion Inc. v. Capital Cities/ABC, Inc.*[156] Two *PrimeTime Live* reporters used false resumes to obtain jobs at Food Lion grocery stores then secretly videotaped unwholesome food practices.[157] In a subsequent *PrimeTime Live* broadcast, allegations were made that Food Lion employees were bleaching rank meat to remove its odor and re-dating and offering for sale products not sold before the expiration date.[158] The truth of the mishandling of meat in the broadcast was not at issue in the litigation.[159] The *Food Lion* jury, finding the news crew liable for fraud and trespass, leveled more than $5 million in punitive damages against the network in that case.[160] The trial judge reduced the damages to $315,000, which was recently overturned on appeal by the Fourth Circuit.[161]

Despite its reversal, *Food Lion* looms over journalists as a warning that even when significant wrongs are uncovered, an elaborate scheme of deception to obtain a story can lead to costly legal battles. Although the court resolved the case under the theories of trespass and fraud, not intrusion, it shows a growing mistrust of the media among judges and jurors. Perhaps under *Sanders*, an intrusion claim by an employee in *Food Lion* ultimately would have been more successful. Both cases involved the invasion of workplace privacy by reporters posing as employees to uncover wrongdoing. The public mistrust of the media is forming a body of case law that protects individuals from unknowingly becoming a tragic segment in reality TV programs. However, the case law may also be used to stifle legitimate journalistic investigative matters vital to the public interest.

Judicial restraint on undercover practices through the expansion of the tort of intrusion will produce a "chilling effect" on these investigations. The

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153. *See* Eleanor Randolph, *"Lipstick Camera" Reshapes TV Investigative Journalism Media*, L.A. TIMES, Jan. 14, 1997, at A11.

154. *See* Lidsky, *supra* note 20, at 218; *see also* Shulman v. Group W Prods., Inc., 955 P.2d 469, 493-94 (Cal. 1998).

155. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 511 (4th Cir. 1999).

156. *Id.* at 510.

157. *See id.*

158. *See id.*

159. *See id.* at 511.

160. *See id.*

161. *See id.* at 511, 524.

"chilling" effect was contemplated by the U.S. Supreme Court in *Cox Broadcasting Corp. v. Cohn*, which found that to "make public records generally available to the media but forbid their publication if offensive" would "invite timidity and self-censorship."[162] Huge jury verdicts, such as the one in *Food Lion*, can be a setback for the major networks and could destroy a local station. Even a slight threat of liability may be enough to deter local stations from going undercover.[163] One of the goals of the press is to be a "watchdog" for the public—scoping out wrongdoing that ordinary citizens busy with their own lives could not detect. News organizations' ability to perform this duty will be greatly diminished if undercover investigations are avoided for fear of costly liability.

Moreover, by instilling fear of liability in the media, courts will inadvertently chip away at journalists' First Amendment rights. Although the broadcast of truthful information would be protected under *Sullivan*, the surreptitious gathering of the same information may lead to intrusion liability. The threat of tort liability will curtail expressions by journalists otherwise protected by the First Amendment. To increase public trust, and perhaps limit judicial interference, journalists should turn their investigative skills toward finding a mode of self-regulation that will sanction gratuitous intrusions yet allow surreptitious newsgathering in matters of great public interest.

A. Options for Self-Regulation

Journalism is not a self-regulated industry.[164] Neither the government nor journalistic professional societies license journalists.[165] There are no formal controls over competence or internal sanctions for wrongdoing. The closest the field comes to self-regulation is a voluntary Code of Ethics promulgated by the Society of Professional Journalists (SPJ).[166] In the early 1990s, SPJ leaders attempted to modify the Code to address the more complex ethical issues facing reporters today.[167] The proposed Code would only endorse deceptive tactics when:

* the information sought is of profound importance. It must be of vital public interest, such as revealing great 'system failure' at the top levels, or it must prevent serious harm to individuals;

* all other methods for obtaining the same information have been exhausted;

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162. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975).

163. *See* Lidsky, *supra* note 20, at 219.

164. *See* David A. Logan, *"Stunt Journalism," Professional Norms, and Public Mistrust of the Media*, 9 U. FLA. J.L. & PUB. POL'Y 151, 158 (1998).

165. *See id.* at 158-59.

166. *See id.* at 159. The SPJ is the largest and most influential organization of journalists. *See id.* Part of its mission is to provide a forum for the discussion of ethical issues. *See id.*

167. *See id.* at 160.

* the individuals involved and their news organization apply excellence, through outstanding craftmanship as well as the commitment of time and funding needed to pursue the story fully;

* the harm prevented by the information revealed through deception outweighs any harm caused by the act of deception; and

* the journalists involved have conducted a meaningful, collaborative, and deliberative decisionmaking process.[168]

The SPJ membership resisted these limits on their conduct and the organization in 1996 adopted a more benign version of the standard for deceptive tactics: "Avoid undercover or other surreptitious methods of gathering information except when traditional open methods will not yield information vital to the public. Use of such methods should be explained as part of the story."[169] Since the failed reform effort, the negative views of surreptitious newsgathering have remained in the limelight with cases like *Sanders* and *Food Lion*. Strengthening the SPJ Code of Ethics and providing enforcement provisions would be a start toward addressing the potentially intrusive methods of surreptitious newsgathering. However, in light of recent court decisions, such reforms may not be strong enough.

A more stringent option for regulating the media is the implementation of a news council. The short-lived National News Council (NNC), created in response to President Nixon's critique of the media, heard complaints from people in exchange for waiving their right to sue the accused news organization.[170] The NNC consisted of fifteen members drawn from the public and the media.[171] The NNC had no punitive powers. Its authority was rooted in the ability to embarrass news organizations, and thus damage their credibility and reputations.[172] The NNC was disbanded in 1984 because it lacked support from major national newspapers that viewed the Council as a threat to their First Amendment freedoms.[173]

News councils have been implemented at the state level with somewhat more success. The Minnesota News Council, founded in 1971, is the longest running

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168. *Id.*

169. *Id.* at 160-61.

170. *See id.* at 173 n.168.

171. *See* Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711, 747 (1999).

172. *See* Logan, *supra* note 164, at 173 n.168.

173. *See id.*; *see also* Campbell, *supra* note 171, at 748. While the NNC eventually gained some support from the press, the industry was never willing to provide financial support for the council's operations. *See id.*

and most successful news council in the nation.[174] The process generally used by news councils mimics that of the NNC.[175] First an individual must complain to the news organization's editors.[176] If the differences cannot be resolved, the person may ask the news council to review the written complaint. The complainant must appear in person at a hearing and sign a waiver agreeing to forgo legal or governmental actions against the news organization.[177] The council then asks the news organization to respond. After an initial review, the council decides whether to take testimony at a hearing. Then the council issues a finding.[178] It cannot penalize news organizations or impose sanctions to enforce its findings. The council's impact results from public airing of the dispute, which can be embarrassing to the news organization and damaging to its credibility.[179] The rationale behind this idea is that media will behave more ethically if it fears misdeeds will be exposed to the public.

Although state news councils may increase the accountability of the media and public trust, they also may cause ill effects. Critics argue that news councils infringe on the media's First Amendment rights by forcing the news organization to choose between newsworthy stories and potential public backlash.[180] Opponents also claim the councils could become press-bashing organizations serving no useful purpose.[181]

A hybrid of the SPJ's Code of Ethics and a news council would produce a method of self-regulation that would be more stringent than the Code alone, yet avoid the potential government involvement in a national news council. Using the SPJ's failed reform provisions as a guide, journalists could develop their own national Code of Ethics and adjudication process similar to that used for attorneys in the American Bar Association's Model Rules of Professional Conduct. Even without the authority to impose sanctions, a Code backed up with an adjudication process that publicized its results across the nation could increase the public trust by ensuring that media misdeeds will be addressed. Damaging a media outlet's credibility may be as effective as hitting its pocketbook.

However, it is unlikely in today's litigious society that a news council that requires complainants to waive future legal claims will be successful. This aspect of the news council model needs to be updated. Yet, by using the news council adjudication process as a precursor to litigation, many frivolous suits could be eliminated before media outlets are exposed to the expense of a legal

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174. *See* Tricia Schwennesen, *Journalists Discuss News Monitoring Panel at Eugene, Ore., Forum*, REG. GUARD, July 19, 1999, at B1. The NNC, patterned after Minnesota's group, started hearing cases from Washington and Oregon in 1992. *See* Michael R. Fancher, *Journalists Don't Agree on Need to Have Group Handle Press Complaints*, SEATTLE TIMES, May 25, 1997, at A17.

175. *See* Fancher, *supra* note 174, at A17.

176. *See id.*

177. *See id.*

178. *See id.*

179. *See id.*

180. *See* Schwennesen, *supra* note 174, at B1.

181. *See id.*

battle. If the media acknowledges the eroding public trust and takes affirmative steps to rebuild that trust, courts may be less apt to further modify tort law to rectify media wrongs.

CONCLUSION

Traditionally courts have taken a "hands-off" approach to the media, allowing the First Amendment to shield journalists from liability under a variety of circumstances. However, some courts have molded the tort of intrusion upon seclusion around the complexities of today's technologically advanced media to find liability for intrusive newsgathering. By expanding the tort to cover non-private intrusions, courts are better equipped to sanction media outlets for undercover newsgathering involving surreptitious surveillance. The amount of case law in California is growing and support for media liability may even be inferred from two recent U.S. Supreme Court cases. Now, it is becoming more likely that other states will follow California's lead.

Although the increased success of the tort of intrusion may protect individuals from egregious invasions of privacy by reality television programs, the tort of intrusion may also stifle legitimate investigative reporting and chip away journalists' First Amendment rights. To avoid further redefining of the tort by courts that may make liability even more likely, journalists should implement a method of self-regulation that will monitor newsgathering behavior and may impose internal sanctions. Self-regulation methods could penalize gratuitous intrusions upon individuals' privacy, while allowing intrusive behavior in cases involving great public interest.

FEE AUDITS CUT MORE THAN FAT OUT OF BILLS, CUTTING HEART OF INSURANCE DEFENSE

LIBERTY L. ROBERTS*

INTRODUCTION

Many liability insurance carriers, pursuant to insurance contracts with their insureds, have a duty to provide and pay for legal defense counsel for their insureds in the event of a lawsuit.[1] Insurance carriers, who are financially responsible for such defense costs, have historically reviewed and audited the defense counsel's legal bills in some manner.[2] Recently, though, audits have become more important as insurance carriers struggle to be competitive in a tight insurance market.[3]

An audit of an attorney's bill is a "careful examination of the legal bills and the underlying documents for the purpose of detecting billing errors, abuses and inefficiencies" according to one legal auditor.[4] Audits serve as a tool to control litigation costs.[5] Traditionally, the insurance carrier internally performed the audits; however, in the last decade, it has become increasingly popular to outsource this task to private firms.[6] The practice of sending bills to outside auditors has sharply divided the defense bar and the insurance industry.[7] The use of outside auditors raises a variety of ethical concerns. The practice is raising the eyebrows of many in the legal profession and has resulted in several state bar

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1. *See* Robert C. Heist, *The Tripartite Relationship and the Insured's Duty to Defend Contrasted with Its Desire to Manage and Control Litigation Through the Introduction of the Legal Audit*, 602 PRACTISING L. INST./LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES 221, 223 (1999). Some states allow the insured to choose their own defense attorneys. *See* J. Stratton Shartel, *Tensions Between Insurers, Outside Counsel Remain Near the Boiling Point*, INSIDE LITIG., Oct. 1993, at 1, 19. However, this Note deals only with outside defense counsel retained and chosen by the insurance company.

2. *See* Brian S. Martin, *Audits of Law Firm Bills: The Issues Inside and Out*, INS. LITIG. REP. 335, 335-56 (1999).

3. *See id.* at 355. At a recent roundtable meeting of outside defense counsel and insurance representatives, insurers expressed concern that insurance premium rates are highly regulated, yet the costs bore by insurance companies, including legal costs, are not regulated. *See* Shartel, *supra* note 1, at 19. Insurers claim that "[t]his, in combination with economic recession, . . . has made maintaining profitability difficult." *Id.*

4. Claire Hamner Matturro, *Auditing Attorneys' Bills: Legal and Ethical Pitfalls of a Growing Trend*, FLA B.J., May 1999, at 14, 16 (quoting 561 PRACTISING L. INST./LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES 99, 157 (1997)).

5. *See* Martin, *supra* note 2, at 355.

6. *See* Lisa Brennan, *Driven to Defection: Fed Up with Insurers' Auditors, Defense Lawyers Go to Work for Plaintiffs*, NAT'L L.J., May 18, 1998, at A1.

7. *See* Lisa Brennan, *Outside Fee Audits Draw Bar Dissent: More State Bars Are Finding Ethical Problems in Audits*, NAT'L L.J., Aug. 3, 1998, at A6.

association ethical opinions on the issue.[8]

This Note addresses the problems created by the outside auditing of legal bills and offers suggestions on how the process can be improved. Part I of this Note will explore the process of legal auditing and the introduction of the auditing industry. It will also delve into the methods used by outside auditing firms and the outside auditor's self-interest in slashing bills. Part II will discuss the ethical rules for attorneys implicated by the use of outside audits. Part III will address the effect of outside audits on the relationships between insurance companies and their outside defense counsel. Finally, Part IV will evaluate the future of outside auditing and offer suggestions on how to improve the relationship between the insurance companies and their outside defense counsel.

I. THE AUDIT PROCESS

Most liability insurance policies contain "duty to defend" provisions that create an obligation for the insurance carrier to defend the insured in the event of a lawsuit resulting from a covered occurrence.[9] The carrier is financially responsible for the attorney's defense cost and the bill is generally sent directly to the carrier. In an attempt to control litigation costs, insurance carriers historically assigned experienced claims professionals the responsibility of scrutinizing the fees charged by the defense attorney.[10] The audit constituted an effort to determine not only the reasonableness of charges and expenses, but also compliance with the carrier's billing requirements.[11] Audits are a means by which insurance carriers can exercise their "rights to monitor the reasonableness of the fees charged and the propriety of the legal services performed."[12]

A. Types of Audits

"There is no single method or procedure by which legal bill audits are

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8. *See* Michael Booth, *State Ethics Bans on Outside Fee Audits Mounting: Third-Party Access to Files Found to Violate Attorney-Client Confidentiality*, 154 N.J. L.J., Oct. 12, 1998, at 93.

9. *See* Heist, *supra* note 1, at 223. A typical duty to defend provision of an insurance contract might read: "The Company shall have the right and the duty to appoint counsel and to defend any suit against the Insured seeking damages which are payable under the terms of this Policy, even if any of the allegations of such suit are groundless, false or fraudulent." *Id.*

10. *See* Douglas R. Richmond, *Of Legal Audits and Legal Ethics*, 65 DEF. COUNS. J. 512, 512 (1998).

11. *See id.*

12. Kent D. Syverud, *The Ethics of Insurer Litigation Management Guidelines and Legal Audits*, 21 INS. LITIG. REP. 180, 189 (1999). The reasonableness of the attorney's fee goes to more than the carrier's subjective determination. Attorneys are ethically bound to charge only fees that are "reasonable." *See* MODEL RULES OF PROF'L CONDUCT R. 1.5 (1999). Reasonableness is determined by a number of factors including, but not limited to, "novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly, [nature and length of relationship, and] the fee customarily charged in the locality." *Id.*

conducted."[13] Legal fee audits take many forms; they range from "superficial" to "comprehensive."[14] The most comprehensive audit involves the application of a computerized program and a visit to the law firm.[15] The visiting auditor interviews key law firm personnel and reviews "all fee and expense entries, law firm work product, expense documentation, pre-bills and time sheets."[16] Slightly less-comprehensive audits include an examination of all the same paper work, but no on-site visit or interviews are performed.[17] Still less comprehensive audits include a review of all "'the law firm's fee and expense billing' without reviewing 'any expense documentation, work product, pre-bills or time sheets.'"[18] The least comprehensive audits consist of a report that addresses specific concerns or issues identified from the attorney's billing entries.[19]

The various types of audits exist because firms are audited for several different reasons.[20] Some audits may be ordered if the insurance company suspects that the law firm is issuing fraudulent bills.[21] In this type of audit, the auditor would compare invoices, documents, and correspondence for which the firm billed, against the actual submitted bill.[22] Another common reason for a legal fee audit is concern that the law firm is acting inefficiently, thus costing the insurance company more than warranted.[23] This type of audit would include reviewing bills for staffing inefficiencies that adversely affect the legal costs.[24]

B. The Development of the Auditing Industry

Regardless of the type and purpose of the audits performed, insurance companies have begun to handle them all in a like manner—by outsourcing the work. By the early 1990s, insurance carriers began hiring outside firms to perform fee audits of their defense attorneys or firms.[25] At the same time, a few cases involving attorneys overbilling their insurance company clients were highly publicized.[26] In the mid-1990s, there was a rash of high-profile cases involving

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13. Martin, *supra* note 2, at 359.
14. Matturro, *supra* note 4, at 16.
15. *See id.*
16. *Id.* (quoting James P. Schratz, *Cross-Examining a Legal Auditor*, 20 AM. J. TRIAL ADVOC. 91, 93 (1996)). Key law firm personnel often include bookkeepers, secretaries, and paralegals. *See id.*
17. *See id.*
18. *Id.* (quoting Schratz, *supra* note 16, at 93).
19. *See id.*
20. *See id.*
21. *See id.*
22. *See id.*
23. *See id.*
24. *See id.*
25. *See* Debra Baker, *You Charged How Much? Insurers Hire Independent Auditors to Pick Apart Lawyers' Bills*, A.B.A. J., Feb. 1999, at 20, 20; Brennan, *supra* note 6, at A1.
26. *See* Darlene Ricker, *Greed, Ignorance and Overbilling*, A.B.A. J., Aug. 1994, at 62, 65.

fraudulent billings by lawyers and law firms.[27] Amid this flood of cases, the practice of auditing bills became increasingly popular.[28] The heightened level of scrutiny applied to defense expenditures gave rise to the legal auditing industry. Since 1996, firms operating specifically as auditors of legal bills have sprung up around the country.[29] By early 1999, five nationwide legal auditing firms and many more regional firms existed.[30] These firms "promised insurance companies more efficient management of the bill review process."[31] They also promised to free insurance claim representatives from the tedious task of reviewing bills, allowing them to focus on the management of the case.[32] The insurance industry took advantage of these services. The auditing industry allowed insurance carriers to free their employees from reviewing bills, and at the same time, allowed them "to review all attorneys' bills, not just suspect or questionable ones."[33]

C. Method Employed by Outside Auditing Firms

The introduction of outside auditing firms allowed many insurance companies to pass off the task of auditing attorney bills. However, it did not make the audits more beneficial. An outside auditor's job is to review bills, not to manage cases. Therefore, outside auditors' only exposure to a case is the receipt of the bill. As a result, they often do not understand the context of the case.[34] Furthermore, they generally have little or "no direct litigation

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In 1987, the Fireman's Fund Insurance Company hired an outside firm to audit a number of suspicious legal bills received from several of their attorneys based in San Diego. The "audit uncovered the so-called 'Alliance' conspiracy, which resulted in [the convictions of about twenty attorneys for] racketeering and mail fraud." *Id.* In 1991, an audit of a firm's legal bills resulted in a voluntary write off of $2.7 million in disputed fees. *See id.*

27. *See* Brennan, *supra* note 6, at A1. These high profile cases included the 1994 guilty plea of Webster Hubble, Associate Attorney General for the United States. *See* Ronald L. Seigneur, *How Cost Auditing Is Impacting Legal Services*, ACCT. FOR L. FIRMS, Nov. 1995, at 6, 6. Hubble pled guilty to two felony counts of mail fraud and tax evasion related to defrauding his prior law firm and its clients out of approximately $394,000. *See id.*

28. *See* Brennan, *supra* note 6, at A1; Seigneur, *supra* note 27, at 7.

29. *See* Wayne J. Baliga, *Litigation Management's Impact on the Insured, Insurer and Legal Counsel*, 602 PRACTISING L. INST./LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES 187, 189 (1999) (stating that the mid-1990s saw an increase in third-party bill review firms); Martin, *supra* note 2, at 356.

30. *See* Martin, *supra* note 2, at 356.

31. Baliga, *supra* note 29, at 189.

32. *See id.*

33. Richmond, *supra* note 10, at 513.

34. *See* Martin, *supra* note 2, at 359; *see also* Baliga, *supra* note 29, at 193 ("The party reviewing the bill reviews [it] without reference to the case file and without reference to the outcome of the case.").

experience."[35] Yet, even given the auditors' lack of knowledge and experience, they are hired for the purpose of scrutinizing attorneys' bills.

Auditors pay attention to the form of the bills, not the substance.[36] Because they are not familiar with the specific case being billed or the unique litigation needs of that case, the auditors must use a cookie-cutter approach. They use the same standard of review for each case regardless of its complexity.[37] Additionally, auditing firms use software to speed up the review process.[38] The very use of software demonstrates the mechanical, non-specific review outside auditors give to each bill.

Typically, when legal auditors receive bills to review, they first break down the time detail[39] to determine "the major activities performed, who performed them, and the time spent."[40] The auditor then looks at each entry and decides whether the case was properly staffed or had too many attorneys working on it, whether the work assignments were delegated to attorneys with the appropriate experience level, whether the tasks should have been performed by attorneys or paralegals, whether the work was duplicated, and whether the attorney performed an "informal cost/benefit analysis before starting research and other projects."[41] The precise means by which the auditor determines each of these issues is unclear.[42] However, because the auditor is only looking at the bill and not the context or outcome of the case, the means used must be a non-specific, standardized approach.

Using a non-specific, cookie-cutter approach is dangerous. "Review[ing] . . . bills without access to the work product underlying those bills can lead to arbitrary [reductions in fees]."[43] Different attorneys may use alternative approaches to handle the same case with no one approach being preferable to another.[44] For instance, some jurisdictions may be more inclined to grant summary judgment than others.[45] Therefore, based on the jurisdiction in which the case is being litigated, a motion for summary judgment may or may not be effective. Depending on the geographical location of the litigation, a motion for summary judgment may be an important litigation tactic or superfluous work. A

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35. Martin, *supra* note 2, at 359.

36. *See* Brennan, *supra* note 6, at A1; Seigneur, *supra* note 27, at 7.

37. *See* Brennan, *supra* note 6, at A1.

38. *See id.*

39. "The time detail consists of a chronological list of entries indicating the date, the attorney who performed the work, the total number of hours spent that day, and a brief description of the work." Jed S. Ringel & Ellis R. Mirsky, *Legal Auditing: The Direct Approach to Controlling Outside Counsel Costs*, 496 PRACTISING L. INST./LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES 631, 634 (1994).

40. *Id.*

41. *Id.* at 635.

42. *See id.*

43. Baliga, *supra* note 29, at 197.

44. *See* Martin, *supra* note 2, at 359.

45. *See id.*

cookie-cutter approach to auditing bills will not take this factor into account. As a result, a bill may be slashed and payment refused when the motion was appropriate because of the likelihood that it could end the litigation. Conversely, payment may be made even when the motion was inappropriate due to the slim chance that the court would grant it.

D. Outside Auditors' Self-interest

The cookie-cutter approach to legal-fee auditing is not the only downfall of the use of outside auditors. Outside auditors have a self-interest in cutting bills.[46] Insurance companies hire these firms for the purpose of scrutinizing their legal bills and cutting the costs. The auditors need to prove they are worth the carrier's money[47]—the greater the reduction in the bill, the better the auditors look.[48] Auditors have "one thing in mind—cutting bills," even if that means cutting legitimate bills.[49]

Many auditors promise to slash bills by ten to twenty percent of the total amount billed by the outside counsel.[50] Additionally, for some auditors, payment is based on the savings they provide to the insurance company.[51] The financial success and continued vitality of auditing firms is dependent on their ability to reduce the litigation costs for insurance carriers.[52] This self-interest results in excessive and unnecessary reductions in legal bills.[53]

II. ETHICAL CONCERNS

The interplay of several Model Rules of Professional Conduct raise legitimate concerns regarding the employment of outside auditing firms.[54]

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46. *See id.* at 358.

47. Insurance companies audit bills in an attempt to save money. Because the insurance companies must pay the outside auditors for this work, the bill cuts must be greater than the fees charged by the auditors. If the auditors' fees exceed the amount saved by the cuts, there would be no financial incentive to hire outside auditors. This reality pressures auditors to make more cuts in order to justify their employment.

48. *See* Booth, *supra* note 8, at 93.

49. *Id.*

50. *See* Hope Viner Samborn, *No-Frills Approach Proving Costly*, A.B.A. J., Mar. 1998, at 30, 30-31; *see also* Baliga, *supra* note 29, at 196 (stating that auditing firms "routinely sell their product with the promise of [ten] to [fifteen] percent cost savings to their clients").

51. *See* Samborn, *supra* note 50, at 31; *cf.* Ricker, *supra* note 26, at 65 (listing that most auditors charge a flat fee of $10,000 to $20,000 for a lengthy audit or an hourly rate of $125).

52. *See* Richmond, *supra* note 10, at 513. "Even auditors who work for flat fees have a compelling interest in justifying their function and cost." *Id.* The auditing industry thrives on the work of insurance companies. "About [seventy percent] of legal auditing firms' clients are insurance companies . . . ." Ricker, *supra* note 26, at 65.

53. *See* Martin, *supra* note 2, at 358.

54. *See id.* at 357. The bar has been accused of "shroud[ing] the debate in ethical term." Baliga, *supra* note 29, at 196. Carriers view the ethical arguments as disingenuous, noting that the

Ethical rules restrict the attorney's ability to disclose information relating to the representation of the client.[55] According to a 1997 decision by the First Circuit Court of Appeals, the disclosure of information released to an auditing firm may constitute a waiver of the attorney-client privilege defense.[56] Furthermore, an attorney is required to exercise independent professional judgment when rendering legal services[57] and may not allow the one who renders payment of the legal fees to direct or regulate that professional judgment.[58]

These ethical rules restrict attorneys, and therefore, do not apply to auditors who are not members of the bar. When an attorney is required by contract to directly submit bills to an auditing firm or when the attorney is informed that the insurance carrier will subsequently submit bills to an auditing firm, many ethical dilemmas surface. Legal auditors claim that the "defense bar is using the ethics argument as a smoke-screen to hide its true motivation for trying to prevent reviews of bills: money."[59] Regardless of whether this issue is a smoke-screen, it is a real concern. The process of handing over bills to outside auditing firms interferes with the attorney's ethical obligations.

A. Confidentiality

An attorney is prohibited from revealing "information relating to [the] representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation."[60] However, insurance companies require attorneys to submit extremely detailed bills.[61] The details of such bills often contain "information about the nature of the legal services and specific legal research performed."[62] This sensitive "information could disclose [the] counsel's mental impressions, strategic decisions and case theories."[63] Defense bills are, in essence, disclosures of specific information relating to the representation of the insured. When bills

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tripartite relationship has functioned well for many years and the ethics of it were only raised when "bill review started to have a serious impact on the bottom line." *Id.*

55. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (1999). "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation . . . ." *Id.*

56. *See* United States v. Mass. Inst. of Tech., 129 F.3d 681, 686 (1st Cir. 1997).

57. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8 (1999).

58. *See* MODEL RULES OF PROF'L CONDUCT R. 5.4 (1999).

59. Baker, *supra* note 25, at 20.

60. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (1999).

61. *See* Richmond, *supra* note 10, at 512.

62. *Id.*

63. *Id.* The bills could contain information regarding how many experts were interviewed. Aggressive plaintiffs' attorneys could easily deduce which of these experts were not chosen or refused to testify for the defense. *See* Martin, *supra* note 2, at 357. The plaintiffs' attorneys could then use this information to their advantage by potentially hiring the unused defense experts to testify for the plaintiffs. *See id.*

are sent to outside auditors, they are the equivalent of disclosures to third parties.

Outside audits improperly interfere with the confidential relationship between the attorney and the client.[64] Defense attorneys argue that giving bills to auditors breaches confidentiality, thus violating Model Rule 1.6(a), unless the consent of the client is obtained after consultation.[65] If an attorney, in accordance with the insurance contract, submits bills to an outside auditor without obtaining the client's permission, the attorney could face professional discipline for violating Model Rule 1.6(a). However, a question remains as to who the client is—the insurance company or the insured.

The insurance companies contend that sending bills to outside auditors is not a breach of confidentiality because the insurer, as well as the insured, are clients in the case.[66] Insurance carriers suggest that as co-clients they are and should be allowed to manage the legal fees they pay in accordance with the goals of the representation.[67]

However, the co-client argument does not solve the confidentiality problem. If both the insurer and the insured are clients, the attorney must nevertheless obtain the permission of both the insurer *and* insured before revealing information relating to the representation of the clients.[68] If the insured refuses to grant permission to reveal information relating to his representation, the consent of the insurance company cannot override that decision. Since the information released would relate to the representation of the insured, the attorney may not ethically submit the bills to an outside auditor when the insured withholds consent.[69] This refusal to consent creates a conflict of interest for the attorney.[70] When such a conflict arises, it is important for the attorney to be aware of who is the primary client.[71] Thus, the co-client argument defeats the

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64. *See* Richmond, *supra* note 10, at 513.

65. *See id.* at 515. Some argue that the information submitted to the legal auditors is not confidential, thus there are no issues of confidentiality. *See* Baker, *supra* note 25, at 23. However, the Model Rules of Professional Conduct do not limit the attorney's duty of confidentiality to information protected by attorney-client privilege. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (1999). The broad duty of confidentiality includes any information relating to the representation of the client. Under this broad definition, the information submitted to auditors is confidential. *See* John Freeman, *Ethics Watch*, S.C. LAW., Jan.-Feb. 1999, at 10, 10-11 (stating that "everything in a client's legal bill constitutes information 'relating' to the representation, and . . . is protected by Rule 1.6").

66. *See* Syverud, *supra* note 12, at 180.

67. *See id.*

68. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (1999).

69. *See* J. Anthony McLain, *Third Party Auditing of Lawyer's Billings—Confidentiality Problems and Interference with Representation*, 60 ALA. LAW. 35, 37 (1999).

70. The attorney's representation of the insurance company, especially its desire to have bills audited, would be limited by the attorney's responsibility to the insured, the other client. Such a situation creates a conflict of interest. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (1999).

71. The retainer agreement by which the defense counsel is employed to represent the insured regulates the attorney's rights and professional obligations. The retainer agreement should

confidentiality problem only if the insured consents to the disclosure.

Several state bar associations have written ethical opinions on the issue of confidentiality as it relates to the submission of defense bills to outside auditors.[72] Since 1997, sixteen state bar associations and the District of Columbia have issued opinions holding that submitting bills to outside auditors constitutes a breach of confidentiality.[73] Only Massachusetts and Nebraska have released opinions which seem to be, at least in part, inconsistent with the opinions of those sixteen states and the District of Columbia.[74]

B. Attorney-Client Privilege

1. United States v. Massachusetts Institute of Technology.—In *United States v. Massachusetts Institute of Technology*[75] (MIT), MIT provided billing statements of law firms to an auditing agency for the Department of Defense in accordance with a contract between MIT and the Department of Defense.[76] The purpose of the audit was to ensure that the government was not being overcharged for services. The IRS requested the same billing statements to ensure that MIT qualified for tax exemption status. MIT submitted the statements to the IRS, but redacted information it claimed was covered by the attorney-client privilege. The IRS sought to obtain the same documents in unredacted form from the auditing agency used by the Department of Defense.[77]

The First Circuit held that the IRS could obtain the unredacted documents because MIT had forfeited its attorney-client privilege when it disclosed the documents to the auditing agency.[78] The court stated that there exists "a small circle of 'others' with whom information may be shared without [waiving the

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set forth who is the primary client: the insured or the insurance company. *See* Kent D. Syverud, *Special Project on Professional Responsibilities of Insurance Defense Lawyers*, 62 DEF. COUNS. J. 503, 503-04 (1995). Some believe that if the retainer agreement does not set forth who is the primary client, but states that both the insured and the insurance company are clients, then the attorney is not to favor either client and should withdraw from the case. *See id.* at 507; *cf.* McLain, *supra* note 69, at 36 (stating that "authorities conclusively establish the proposition that the insured is the attorney's primary client and it is to the insured that the attorney owes his first duty of loyalty and confidentiality"); Matturro, *supra* note 4, at 18.

72. *See* McLain, *supra* note 69, at 38.

73. *See* Syverud, *supra* note 12, at 191 n.47 (listing Alabama, Alaska, Florida, Indiana, Kentucky, Louisiana, Maryland, Missouri, New York, North Carolina, Pennsylvania, South Carolina, Utah, Vermont, and Washington); *see also* McLain, *supra* note 69, at 38 (listing the Montana Bar Association also).

74. *See* McLain, *supra* note 69, at 38. These opinions appear to be unofficial or informal opinions. *See id.*

75. 129 F.3d 681 (1st Cir. 1997).

76. *See id.* at 683.

77. *See id.* at 682-83.

78. *See id.* at 687.

attorney-client] privilege."[79] The auditing agency, however, was outside the circle, and when information is disclosed to a party outside the circle, the attorney-client privilege is waived.[80] The court noted that the potential for dispute and litigation existed as a result of the auditing agency's review of the bills.[81] Therefore, the auditing firm was a potential adversary.[82]

2. The Effects of United States v. MIT.—The holding in *MIT* makes the disclosure of attorneys' bills to an auditing agency a waiver of attorney-client privilege.[83] The facts in *MIT* are strikingly similar to those in which an attorney discloses billing statements to an auditing agency, at the request of the insurance carrier, for the purpose of ensuring to the insurance carrier that it is not being overcharged. If other courts adopt the reasoning of the First Circuit Court of Appeals, all bills given to auditing firms will lose attorney-client privilege protection.

At least one opponent has argued that the holding of *MIT* will not extend to disclosures made pursuant to insurance contracts since the "disclosure of billing information is necessary to facilitate the insured's representation and because the insurer and insured have a common interest in efficient, cost-effective and appropriate representations."[84] Assuming, *arguendo*, that the insured and insurer have a common interest in the efficient and cost-effective representation, this is the same interest that MIT and the Department of Defense had in *MIT*. Regardless of this interest, the court nevertheless found that the disclosure of the information to the auditing agency constituted a waiver of the attorney-client privilege.[85]

The auditors in insurance contracts are in the same adversarial position as auditors in the *MIT* case. Both auditors review bills for potential billing disputes. Moreover, the possibility of a resulting dispute is even greater in the insurance defense case because many auditing firms promise to slash bills by ten to twenty percent.[86] Therefore, the holding in *MIT* would apply to insurance defense

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79. *Id.* at 684.

80. *See id.* at 686.

81. *See id.* at 687.

82. *See id.*

83. *See id.*

84. Syverud, *supra* note 12, at 192. The argument can be made that the employment of an outside auditing firm does not necessarily facilitate the insured's representation, and thus, may not be in the best interest of the insured. Auditing firms can often hamper the representation of the insured by slashing bills and disallowing payment for necessary and appropriate litigation tactics. Refusal to pre-approve or make payment for necessary and appropriate litigation tactics could harm the insured's case and possibly cause the insured to face personal liability. If the lawsuit involves a claim that is in excess of the insurance coverage limits, and the insurance company, acting through the outside auditor, refuses to pre-approve or make payment for necessary tactics, the insured could lose the lawsuit and be held personally liable for the amount of the judgment in excess of the insurance coverage. Such a result would not facilitate the insured's representation.

85. *See MIT*, 129 F.3d at 687.

86. *See* Samborn, *supra* note 50, at 30-31. In 1998, scrutiny by Law Audit Services, a

contracts, and the disclosure to the auditing agency would waive the attorney-client privilege.[87]

The holding in *MIT* has not yet been adopted by other jurisdictions. However, the potential for a waiver of the attorney-client privilege exists in all jurisdictions. Where the possibility exists that disclosure will result in a waiver of the attorney-client privilege, the "[a]ttorney[] . . . should err on the side of non-disclosure."[88]

C. Independent Professional Judgment

1. The Applicable Model Rules.—The release of case information to the outside auditing firm waives the attorney-client privilege. When the outside auditing firm reviews the information and attempts to control the management of the case by disapproving payment for necessary services, the auditor infringes upon the attorney's independent professional judgment, in violation of the Model Rules of Professional Conduct. The Rules permit a lawyer to accept compensation from someone other than the client, for his representation of a client, only if "(1) the client consents after consultation; (2) there is no interference with the lawyer's independence of professional judgement or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6."[89] Additionally, a lawyer cannot allow a person who pays the lawyer for legal services rendered for another to "direct or regulate the lawyer's professional judgement in rendering such legal services."[90]

2. The Implication of the Model Rules.—The use of outside auditors infringes on the lawyer's ability to exercise his independent professional judgment and represent the client to the "fullest extent possible."[91] To a certain degree, insurance carriers try to delegate to outside auditors the power to dictate how a case should be litigated. The founder of one auditing firm admits that auditors tell lawyers "how to practice law."[92] "Unlicensed outsiders, untrained in the law and not subject to [the] Supreme Court's disciplinary oversight, have

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national auditing firm, resulted in cuts of approximately ten percent of the bills' dollar value. *See* Milo Geyelin, *Crossing the Bar: If You Think Insurers Are Tight, Try Being One of Their Lawyers*, WALL ST. J., Feb. 9, 1999, at A1.

87. Some argue that because an agency relationship exists between the insurance company and the auditors, the disclosure would not constitute a waiver of attorney-client privilege. *See* Baker, *supra* note 25, at 23. However, the same agency relationship was present in *MIT*; nonetheless, the court found a waiver of the attorney-client privilege.

88. McLain, *supra* note 69, at 38.

89. MODEL RULES OF PROF'L CONDUCT R. 1.8(f) (1999).

90. MODEL RULES OF PROF'L CONDUCT R. 5.4(c) (1999).

91. Baker, *supra* note 25, at 20.

92. *Id.* at 23 (quoting Richard Robbins, Founder of the Manhattan-based auditing firm, Law Cost Management). Robbins explained that auditors dictate what the attorney should do "in terms of what everyone else is doing." *Id.*

no business trying to regulate how lawyers exercise their independent professional judgment on behalf of client-insureds."[93]

Without necessarily having knowledge of the case, auditors make value judgments about the time required to perform certain tasks and whether the task should be performed at all.[94] Auditors determine, based on the description of the task contained in the bill, whether a paralegal or secretary, as opposed to an attorney, should perform the task.[95] These arbitrary judgments concerning services rendered impede the lawyer's independent professional judgment.[96] In one instance, an attorney drafted a twenty-page coverage opinion.[97] The auditor of the bill refused payment for the work because he thought the attorney should have billed for less than one hour for the services rendered.[98] The auditor either failed to recognize (1) that this particular opinion was so extensive (twenty pages) that it would require more than the usual allotted time for drafting of opinions or, (2) that the complexity of the case required such a detailed opinion.[99] These arbitrary judgments made by auditors threaten a lawyer's ability to fully and completely represent clients.[100] Attorneys can either perform the work they believe is necessary to the representation and risk refusal of payment or refrain from rendering a particular service and breach the ethical obligation to zealously represent the client.[101] Recognizing the changing circumstances in insurance defense, Justice Gonzales, in his concurrence and dissent in *State Farm Mutual Automobile Insurance Co. v. Traver*,[102] expressed concern "that defense lawyers may be reluctant to resist cost-cutting measures" established in billing restrictions and audits.[103] This reluctance raises the risk of compromising the attorney's "autonomy and independent judgment on the best means of defending an insured."[104]

Attorneys should resist following any tactics or strategies recommended by the auditor that would dictate how the case should be handled. Decisions of how

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93. Freeman, *supra* note 65, at 11; *see also* Booth, *supra* note 8, at 93. Only a small percentage of auditors are also attorneys. *See* Brennan, *supra* note 6, at A1. *But cf.* Ricker, *supra* note 26, at 65 (stating that most auditors are attorneys with accounting backgrounds).

94. *See* Booth *supra* note 8, at 93.

95. *See* Brennan, *supra* note 6, at A1.

96. *See* Baker, *supra* note 25, at 20.

97. *See id.*

98. *See id.*

99. Neither of these points would be recognized by computer software used by some auditing firms as discussed *supra* Part I.C. This example demonstrates how a cookie-cutter approach to reviewing bills is inadequate.

100. *See* Baker, *supra* note 25, at 20.

101. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (1999). A lawyer should advocate zealously on his client's behalf. *See id.* A lawyer should use "professional discretion in determining the means by which a matter should be pursued." *Id.*

102. 980 S.W.2d 625 (Tex. 1998).

103. *Id.* at 634 (Gonzalez, J., concurring and dissenting).

104. *Id.*

a case should be handled are to be made by attorneys and clients, not those hired to slash bills.[105] Attorneys must use their independent professional judgment, examine the idiosyncrasies of each case and determine what actions are appropriate. Outside auditors lack expertise[106] and flexibility, and as a result, often fail to consider the complexities of each case.[107]

D. Unauthorized Practice of Law

The Model Rules prohibit a lawyer from "assist[ing] a person who is not a member of the bar in the performance of any activity that constitutes the unauthorized practice of law."[108] There is no one definition of the "practice of law"; instead it varies with the laws of each jurisdiction.[109]

In *In re Youngblood*,[110] the Tennessee Supreme Court ruled on the extent of control an insurance company may exercise over a defense attorney it hires for its insured. In *Youngblood*, the court held, notwithstanding the existence of the employer-employee relationship, the insurance company could not "control the details of the attorney's performance, dictate the strategy or tactics employed, or limit the attorney's professional discretion with regard to the representation."[111] To avoid aiding in the unauthorized practice of law, insurance defense attorneys "must ensure that the insurance company does not control or interfere with the exercise of [their] professional judgment in representing insureds."[112]

Attempting to dictate the strategies and tactics of the case can amount to the unauthorized practice of law, whether it is done by the insurance company or an

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105. *See* Freeman, *supra* note 65, at 11.

106. *See supra* Part I.C.

107. *See* Brennan, *supra* note 7, at A6.

108. MODEL RULES OF PROF'L CONDUCT R. 5.5 (1999).

109. *See* MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 1 (1999) (indicating that many jurisdictions do not have a specific statute defining the practice of law, but allow the courts to determine on a case-by-case basis whether an activity constitutes the unauthorized practice of law); *see also* State v. Martinez, 996 P.2d 371, 374-75 (Kan. Ct. App. 2000) ("[w]hat constitutes the unauthorized practice of law must be determined on a case-by-case basis") (internal citation omitted); Rahbaran v. Rahbaran, 494 S.E.2d 135, 139 (Va. Ct. App. 1997) ("Court[s] ha[ve] the inherent power . . . to inquire into the conduct of any person to determine whether that individual" is engaging in the unauthorized practice of law); *In re* Opinion No. 24 of Committee on Unauthorized Practice of Law, 607 A.2d 962, 966 (N.J. 1992) (quoting *In re* Application of the New Jersey Soc'y of Certified Pub. Accountants, 507 A.2d 711, 714 (N.J. 1986)) ("The practice of law is not subject to precise definition. It is not confined to litigation . . . ."). Accordingly, the actions of the outside auditor, if reviewed, could be found to be the unauthorized practice of law.

110. 895 S.W.2d 322 (Tenn. 1995). This case dealt with an attorney who was a salaried employee of the hiring insurance company. However, regardless of whether the insurance company hires an in-house attorney or outside counsel, the employer-employee relationship is the same.

111. *Id.* at 328.

112. *Id.* at 331 (internal citations omitted).

outside auditor.[113] Essentially, when an outside auditor reviews bills and refuses to approve payment for specific actions, the auditor is dictating how the case should be litigated. In doing so, the outside auditor infringes on an attorney's exercise of independent professional judgment and makes decisions that must be made by an attorney. According to the law of some jurisdictions, this simple act might be the unauthorized practice of law. Therefore, an attorney who allows strategies or tactics to be regulated by outside auditors risks being the subject of disciplinary action for assisting in the unauthorized practice of law by the auditor.[114]

III. Effect of Outside Audits on Attorney-Insurer Relationship

A. Animosity

The use of outside auditors has not only affected defense attorneys' legal ethics, but it has also created animosity between defense attorneys and insurance companies. The increased use of outside auditors is fraying ties between defense attorneys and insurers.[115] Insurance companies insist on conducting audits based on their perception that lawyers are overcharging for their services.[116] However, lawyers perceive audits to be arbitrary.[117] At least one defense attorney believes that no other single issue "has more sharply divided the defense bar and the insurance industry."[118] Audits are causing such a great chasm because many lawyers feel that when their bills are continuously reviewed, their integrity is being questioned.[119] One such defense attorney believes the underlying assumption with audits is that lawyers cannot be trusted—"all lawyers cheat."[120] Other defense attorneys see outside fee audits as personal attacks and liken them to the managed care systems that subject doctors to review committees that second guess the types of procedures doctors deem necessary for their patients.[121]

Insurance companies deny that questioning bills is a personal attack on the

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113. An insurance company would have more leeway in attempting to control the strategy and tactics of the case if it is considered a co-client. However, the auditing firm is not a co-client and would have less leeway in attempting to dictate strategy and tactics.

114. *See* Freeman, *supra* note 65, at 11.

115. *See* Geyelin, *supra* note 86, at A1; *see also* Baker, *supra* note 25, at 20 (stating that audits are "effectively destroying the relationship between insurance firms and the legal profession") (internal citations omitted).

116. *See* Baker, *supra* note 25, at 23.

117. *See id.*

118. Brennan, *supra* note 7, at A6 (quoting Robert E. Scott Jr., a partner in the Baltimore firm, Semmes, Bowen & Semmes, and president of the Defense Research Institute, an organization of 21,000 insurance defense attorneys based in Chicago); *see also* Brennan, *supra* note 6, at A1.

119. *See* Brennan, *supra* note 6, at A1.

120. Geyelin, *supra* note 86, at A1 (quoting Terrance C. Sullivan, who worked as an insurance defense attorney for fourteen years in Atlanta, Georgia).

121. *See* Brennan, *supra* note 6, at A1.

honesty of the lawyers.[122] Insurers are responsible for paying the reasonable costs and expenses of defending claims.[123] They insist that audits are a means of determining which costs are reasonable.[124] Insurance companies claim the real reason for auditing is financial—controlling litigation costs.[125] Insurers are aware of recent studies that show that litigation costs have risen to between thirty percent and fifty percent of every dollar paid out on claims.[126] Insurers, armed with these results and confronted with the rash of headlines concerning billing abuses by law firms, have employed audits to scrutinize attorneys' bills.

Insurance companies point to high-profile cases of billing abuses in an attempt to justify their use of audits.[127] For instance, in 1996, a Florida attorney hired by Lloyd's of London Insurance Company was convicted of fraudulently billing the company $5 million.[128] Other egregious billing abuses reported include lawyers overbilling insurance companies for four and one half hours to look up an address in a library,[129] for billing a total of thirty-eight hours in one day,[130] and for billing a non-refundable airline ticket and a tuxedo rental when an attorney missed an out-of-town wedding due to a trial continuance.[131] Instances such as these and many others[132] seem to provide sufficient justification for insurance companies to audit attorneys' bills.

Insurance companies have compiled numerous examples of how some attorneys abuse the ability to bill insurance company clients freely and unchecked. Thus, insurance companies face a dilemma—risk paying fraudulent bills by accepting attorney bills without question or straining the relationship

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122. *See* Shartel, *supra* note 1, at 20. Insurance companies make the claim that they are not questioning the honesty of lawyers, but nonetheless, they employ auditing firms that promise to reduce bills by a predetermined percent. Promised bill cuts "presume[] that all firms run their practice in an inefficient manner[,]" and presume that some firms operate dishonestly. Baliga, *supra* note 29, at 197.

123. *See* Howard M. Tollin & Tammy Feman, *Litigation Management: What Legal Defense Costs are Reasonable and Necessary?*, 63 DEF. COUNS. J. 529, 529 (1996).

124. *See id.* at 530.

125. *See* Shartel, *supra* note 1, at 20.

126. *See* Martin, *supra* note 2, at 355. Regardless of the exact amount, "it [is] clear that legal fees [are] growing while premium and investment dollars to pay those fees [are] decreasing." Baliga, *supra* note 29, at 190. "Litigation costs nationwide had jumped to 34.8% of total losses paid out in 1994, from 29.5% in 1988." Geyelin, *supra* note 86, at A1. Insurers suspect that a large part of that increase is due to excessive billing by lawyers. *See id.*

127. *See* Martin, *supra* note 2, at 361.

128. *See* Geyelin, *supra* note 86, at A1; Martin, *supra* note 2, at 361.

129. *See* Geyelin, *supra* note 86, at A1.

130. *See id.*

131. *See* Martin, *supra* note 2, at 361.

132. *See* Seigneur, *supra* note 27, at 6-7. Other examples of outrageous overbilling include charging clients for lost money when an employee's purse was stolen during an out-of-town deposition and weekend late-night limousine service, including a gratuity, an additional tip, and a "special order" for an attorney. *Id.*

with their defense attorneys by auditing the legal bills, causing attorneys to feel mistrusted. Although obvious problems exist, the increased use of outside auditors is not the solution. Audits have caused a dramatic decline in constructive discussions between insurance companies and defense attorneys.[133] Carriers' aggressive attempts to eliminate fraudulent billings have resulted in the existence of unhealthy tensions between insurance carriers and their outside defense counsel.[134]

B. Audits Create Burden for Insurance Defense Attorneys

Attorneys' discontent with fee audits goes beyond their sense that the audits are a personal attack on their integrity and honesty. Audits hit lawyers where they are most vulnerable—their time.[135] Bill cuts have forced attorneys to spend more time trying to get paid than actually working on files.[136] Some attorneys have complained about spending as much as one-third of the workday trying to get paid by insurance companies for work performed.[137] One firm even assigned an associate "to do nothing but deal with 'silly billing questions' from insurers."[138] If attorneys wish to receive payment for services provided but subsequently cut, they must spend otherwise billable hours pouring over bill cuts and challenging them.[139]

The increased use of bill auditing has created a tremendous administrative burden on attorneys.[140] The loss of otherwise billable time has made insurance defense an unprofitable area of law.[141] Insurance defense traditionally was "among the thinnest profit margins in the legal business," and the increased use of fee audits has made it even more so.[142] Insurance defense attorneys had already given insurance companies a sweetheart deal; they agreed to charge

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133. *See* Brennan, *supra* note 6, at A1. This decline is contrary to the claimed purpose of audits. Carriers claim the purpose of bill review "is to create a dialogue with counsel concerning the handling of cases." Shartel, *supra* note 1, at 20.

134. *See* Baliga, *supra* note 29, at 189 (stating that outside audits create tensions between the insurance company, the auditing firm, and the defense attorneys); Shartel, *supra* note 1, at 20.

135. *See* Geyelin, *supra* note 86, at A1.

136. *See* Brennan, *supra* note 6, at A1.

137. *See* Geyelin, *supra* note 86, at A1. Attorneys are forced to spend time getting prior authorization from the insurance company to perform simple tasks, such as research requiring more than two hours. *See id.* Additional time is spent reviewing cuts made by the auditors and responding in an attempt to receive payment. *See id.*

138. Shartel, *supra* note 1, at 19.

139. *See* Geyelin, *supra* note 86, at A1. If the attorney wishes to challenge the cuts, he often must appeal to the auditing firm first. If payment is again denied, he can then appeal to the insurance company directly. *See id.*

140. *See* Samborn, *supra* note 50, at 31. Attorneys must spend time writing detailed bills and disputing bill cuts. *See id.*

141. *See* Brennan, *supra* note 6, at A1.

142. Geyelin, *supra* note 86, at A1.

carriers a lower hourly fee in exchange for a high-volume of caseloads and predictability of payment.[143] The use of fee audits is eroding this arrangement by making payments time consuming and less than predictable.[144] The costs of fighting bill cuts often outweigh the benefits gained by the cuts themselves.[145]

C. Diminished Quality of Representation for Insurance Defense

The increased burden audits have placed on insurance defense attorneys has caused many insurance defense attorneys to leave the practice. Many defense firms and individual attorneys are switching sides of the bar or expanding their practices to include more lucrative practice areas.[146] Many attorneys remaining in the area of insurance defense are facing or staving off bankruptcy.[147]

Faced with a narrowing profit margin, Lowis & Gellen, a Chicago medical malpractice defense firm, recently expanded its practice to include other types of litigation.[148] Similarly, Kincaid, Gianuzio, Caudle & Hubert, an insurance defense firm in Oakland, California, closed its doors in 1996.[149] LaBrum & Doak, a Philadelphia insurance defense firm, closed its doors in 1998 after ninety-two years of practice.[150]

Audits have also caused many attorneys to switch sides of the bar.[151] Flocks of formerly dedicated insurance defense attorneys are leaving the practice.[152] Terrance C. Sullivan, an attorney who successfully defended an insurance company in a $1.3 million medical malpractice case, left his practice to join one of Georgia's top plaintiffs' firms.[153] Another attorney, James M. Ianiri, "[f]ed up with documenting his work just to pass audits," left his position as a senior associate at the prestigious Boston firm of Morrison, Mahoney & Miller to form his own plaintiffs' firm.[154]

The heightened use of fee audits has caused many experienced lawyers to leave the insurance defense practice area, diminishing the quality of representation available for insurance defense.[155] When experienced lawyers

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143. *See id.*

144. *See id.*

145. *See* Samborn, *supra* note 50, at 31.

146. *See id.* at 30.

147. *See* Brennan, *supra* note 6, at A1.

148. *See* Samborn, *supra* note 50, at 30.

149. *See id.*

150. *See id.*

151. *See* Brennan, *supra* note 6, at A1.

152. *See id.*; *see also* Brennan, *supra* note 7, at A6.

153. *See* Geyelin, *supra* note 86, at A1. Attorney Terrance C. Sullivan founded Sullivan, Hall, Booth & Smith, a firm specializing in insurance defense. Sullivan left his firm in 1998 after becoming frustrated with arbitrary bill cuts by outside auditors and the time consuming process required to get insurance companies to pay. *See id.*

154. Brennan, *supra* note 6, at A1.

155. *See* Richmond, *supra* note 10, at 520.

leave the practice, insurance companies must hire less experienced counsel to represent their insureds. Less experienced counsel may charge the company lower rates to handle cases, but may be less able to protect the insurance company's interests. Thus, the costs saved on the lower legal fees must be balanced with the costs of losing more cases.

IV. Future of Fee Audits and Proposed Solutions

The disruption in the insurance defense industry caused by the increased use of fee audits does not necessarily mean that the practice of fee audits must be completely abandoned. The insurance defense industry can survive even with the continued use of fee audits.[156] However, to avoid irreparably damaging insurance defense, the insurance companies should alter their approach to legal fee audits.

A. Insurance Companies Have Gone Too Far

Legal fee audits are not entirely evil innovations. Attorneys are ethically bound to charge clients only reasonable fees.[157] Auditing legal bills is a "reasonable and appropriate means by which insurers exercise their rights to monitor the reasonableness of the fees charged."[158] Fee audits also serve as an opportunity for law firms to "improve their processes and efficiencies."[159]

Although fee audits can be beneficial, the employment of outside auditors to review every legal bill from every defense attorney is extreme, and the secondary effects reduce the benefits. A national practice of scrutinizing every attorney's bill, even those who have not previously engaged in abuses and are not suspected of current abuse, is too extreme.[160] Insurance companies have taken their fight against overbilling too far.[161] Although the extensive employment of audits has helped insurance companies discover billing abuses,[162] they have also damaged the relationship between insurance companies and defense counsel.

B. Revitalizing the Relationship

1. Return to In-House Auditors.—Insurance companies will most likely continue to audit the bills of their defense attorneys in an attempt to control litigation expense. However, the carriers would benefit in a return to the

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156. Although their use was not as prevalent, many insurance companies performed legal fee audits for many years, and the industry has survived.

157. *See* Model Rules of Prof'l Conduct R. 1.5(a) (1999). "A lawyer's fee shall be reasonable." *Id.*

158. Syverud, *supra* note 12, at 189; *see also* Shartel, *supra* note 1, at 21.

159. Shartel, *supra* note 1, at 21.

160. *See id.* at 20.

161. *See id.* at 21.

162. *See id.* at 20. Audits have identified extensive research on marginal issues, multiple charges for file review unconnected to any objective, and other unnecessary or fraudulent charges. *See id.*

traditional practice of using in-house auditors.[163] This shift would allow the insurance companies to use audits to control legal costs and relieve the tension between attorneys and insurance companies resulting from the employment of outside auditors. This in turn would allow attorneys to feel less threatened[164] because the in-house auditors are not motivated by self-interest in making unreasonable cuts to the legal bills.

In addition to removing self-interest motivation, in-house audits will also benefit the attorney-carrier relationship because the audits can be particularized for each case. Many attorneys complain that outside auditors use a cookie-cutter approach to determine which actions are necessary and which are superfluous and accordingly make cuts to the bills.[165] The very definition of in-house auditors implies that the auditors have regular access to in-house counsel and the insurance claims representatives handling each case. The auditors can consult with these insurance company employees who are familiar with the case to determine whether questionable billing entries are proper actions in the context of each particular case. Audits will be more case-specific and will not result in fee cuts for actions that do not fit the cookie-cutter model of litigation.

Most importantly, the return to in-house auditors will also help solve attorney-client confidentiality problems created by the employment of outside auditors.[166] In-house auditors are the carrier's employees;[167] as employees, the auditors will share the carrier's attorney-client privilege with defense counsel.[168] Information will not be sent to an auditor who is outside the "small circle of 'others' with whom information may be shared."[169] Therefore, the threat of breaching the attorney-client privilege will not exist as it does with the use of outside auditors.[170]

Insurance companies do not deny the benefits of in-house audits. Nevertheless, they complain that in-house auditors increase their costs.[171] The

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163. *See* Brennan, *supra* note 6, at A1.

164. *See* Martin, *supra* note 2, at 358; Larry Smith, *A Profession in Transition: Auditors Expand Practice Amid Growing Criticism*, OF COUNS., Oct. 4, 1993, at 5-6; *see also* Richmond, *supra* note 10, at 522. In-house auditors are employees of the insurance company and, therefore, will be paid regardless of the amount of cuts they make. This is contrary to outside auditors who are often paid according to the dollar amount of cuts they make. *See* Samborn, *supra* note 50, at 31.

165. *See* Brennan, *supra* note 6, at A1.

166. *See* Martin, *supra* note 2, at 358.

167. *See id.*

168. *See id.*

169. United States v. Mass. Inst. of Tech., 129 F.3d 681, 684 (1st Cir. 1997).

170. *See* Martin, *supra* note 2, at 358.

171. *See id.* Insurance companies must pay for the audits whether they are preformed in-house or by an outside firm. Thus, auditing itself, rather than the use of in-house auditors, increases insurance companies' cost. The cost difference is in the total amount of bill cuts made by the auditors. Outside auditors only appear to cost less because they routinely make more bill cuts than in-house auditors. This is not necessarily saving the insurance company money. *See supra* Part

companies fail to recognize that "[t]he decision whether to use in-house staff or an outside auditing firm is not as simple as deciding which is more cost effective."[172] Outside audits create a potential for confidentiality problems and strain the relationship between the insurance company and the defense attorney. These factors need to be considered in conjunction with the financial costs when companies are determining whether to employ in-house or outside auditors.

2. Increase Communication.—Even if insurance carriers choose not to return to using in-house auditors, the insurance carriers should keep their lines of communication open with their defense attorneys in any attempt to control litigation costs. "[D]etailed and candid communication can lessen the tensions" created by audits.[173] Attorneys most commonly suggest increased communication as a means to improve the relationship between insurance companies and defense counsel.[174] When an insurance company consciously increases communication with its defense attorneys, after having alienated them for years as a result of the auditing process, the company's defense attorneys will express that the quality of the relationship has improved, even if only slightly.[175]

3. Involve the Defense Counsel in the Process.—Increasing communication will allow the outside counsel to feel as though they are involved in the auditing process. To further improve the relationship, companies should take steps beyond simply increasing communication; they should actually involve their defense counsel in the auditing process from the outset.[176] Companies should advise their outside counsel that their bills will be audited.[177] The attorneys should be advised of the techniques used by the auditors and the goals of the audits.[178] This sharing of information would present auditing as a "joint effort to achieve quality legal representation at [a] reasonable cost."[179] The tone used by the carrier to communicate with its defense attorney will control how smoothly the audit will go.[180] If the insurer communicates to the attorney that the audits are not a personal attack and are intended to help litigate the case in the most efficient manner, the process will appear less threatening to the outside counsel. Furthermore, carriers should adopt the philosophy, and communicate it to their attorneys, that the insurance company assumes that the attorney is acting in good faith until proven otherwise.[181] Such actions will reduce the attorneys' impressions that the auditor is hired to criticize their work and

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III.C.

172. Martin, *supra* note 2, at 356.
173. *Id.* at 363.
174. *See* Shartel, *supra* note 1, at 23.
175. *See id.*
176. *See* Ringel & Mirsky, *supra* note 39, at 641.
177. *See id.*
178. *See id.*
179. *Id.*
180. *See* Shartel, *supra* note 1, at 21.
181. *See id.*

professionally ambush them.[182]

4. Develop Legislation.—Legislation would also be helpful in removing sources of tension between carriers and their outside counsel.[183] Fifteen years ago, a California court[184] held that insureds could select their own defense counsel.[185] In the aftermath of this decision, insurance companies complained that independent attorneys chosen by the insured and not under contract with insurance companies were charging rates in excess of the prevailing rates.[186] As a result, the California legislature enacted a statute to control the fees for which insurance companies are responsible when their insureds obtain independent counsel.[187] The statute provides that "[t]he insurer's obligation to pay fees to the independent counsel . . . is limited to the rates which are actually paid . . . in the defense of similar actions in the community where the claim arose or is being defended."[188]

This same concept can be applied to situations in which the carrier selects and retains the defense counsel. States should enact legislation that sets a standard against which carriers can compare the fees their defense counsel has charged them. This would set a universal standard to which attorneys could consult to ensure their fees are within a reasonable amount. Attorneys would know in advance what fee they could bill for work performed for the insurance carrier. This would eliminate the need for arbitrary judgments in auditing regarding whether the fee charged for an activity was reasonable.[189]

Although such statutes would help establish general fee guidelines attorneys and insurers could consult, it would not eliminate all disputes created by fee audits. Audits evaluate whether certain performed legal services were necessary or unnecessary. The suggested legislation could not control these disputes. Therefore, legislation controlling charges for defense activities is only a partial solution and would need to be combined with other reforms[190] in order to improve the strained relationship between many insurance companies and their outside counsel.

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182. *See* Ringel & Mirsky, *supra* note 39, at 641.

183. *See* Shartel, *supra* note 1, at 22.

184. *See* San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc., 162 Cal. App. 3d 358 (1984).

185. *See* Paul M. Vance & Cindy T. Matherne, *Legal Ethics—Defense Counsel's Responsibilities to Insured and Insurer*, 6 U.S.F. MAR. L.J. 157, 162 (1993).

186. *See id.*

187. *See id.* at 164-65.

188. CAL. CIV. CODE § 2860(c) (West 1999).

189. Measures would need to be taken to ensure that this standard would allow for some flexibility and would not be a statutory enactment of the cookie-cutter approach currently used by outside auditing firms. Standards would need to be developed that differentiate between cases based on complexity or that can be rebutted by showing that a particular charge was reasonable because of the complexity of the issue or task, even if it is higher than the universal standard.

190. *See* discussion *supra* Part IV.B.1-2.

CONCLUSION

Insurance companies, faced with regulated premium rates and increasing legal costs, view legal fee audits as a means to control litigation costs.[191] Carriers, fearing that defense attorneys fraudulently bill, implemented a system of reviewing all attorney bills.[192] This led to the development of an auditing industry, which has enabled insurance companies to outsource the audits instead of performing traditional in-house audits.[193]

The insurance industry's employment of outside auditing firms has been successful in some aspects. It has led to the identification of some frequent and obvious billing abuses by outside counsel.[194] However, this practice has also raised ethical concerns for attorneys and has given rise to great animosity and tension between the insurance companies and their outside defense counsel.

The insurance industry must recognize the ethical issues raised by outsourcing fee audits. Sending legal bills to outside auditors may breach the attorney's duty of confidentiality. More importantly, the information released to the outside auditor may lose the protection of the attorney-client privilege.[195] As a result, plaintiffs' attorneys would be able to obtain the information contained in the legal bills through the discovery process, and it could be used to the detriment of the insured and the insurer at trial.[196] Additionally, to the extent that fee audits are an attempt to tell attorneys how to practice law, they interfere with attorneys' abilities to exercise independent professional judgment. Finally, an auditor who attempts to dictate how a case should be litigated and who makes decisions that should be controlled by an attorney may be engaging in the unauthorized practice of law.

The ethical issues are not the only concerns of which insurers need to be aware before they choose to employ outside auditing firms. Outside audits have created an adversarial relationship between the insurance companies and their outside defense counsel. As a result, many experienced attorneys have left the insurance defense industry.[197] The departure of experienced defense counsel has diminished the quality of representation available to insureds. Insurance companies are forced to replace these experienced attorneys with less experienced attorneys who may not be able to protect insurance companies' interests. The total financial and social costs of employing outside auditors far outweigh any minor financial benefit insurance companies may receive from their use.

It is not only possible, but also predictable, that some amount of overbilling

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191. *See* Martin, *supra* note 2, at 355.
192. *See* Shartel, *supra* note 1, at 1.
193. *See* Brennan, *supra* note 6, at A1.
194. *See* Shartel, *supra* note 1, at 20.
195. *See generally* United States v. Mass. Inst. of Tech., 129 F.3d 681 (1st Cir. 1997).
196. *See id.*
197. *See generally* Samborn, *supra* note 50.

will occur.[198] Faced with this truth, insurance companies need to take precautions to ensure that they only pay reasonable defense expenses. However, in their effort to do so, insurance companies need to take into account attorneys' perceptions of the process. Insurance carriers need to remember that strong relationships with talented and committed defense lawyers are a good long-term investment.[199]

Legal fee auditing serves a desirable function in insurance defense. It can monitor and control legal costs by ensuring work is done efficiently and alert carriers to possible fraudulent billing. However, insurance carriers need to ensure that the process of auditing serves these important goals without damaging the attorney-carrier relationship. Audits need to be performed in a manner that allows outside counsel to benefit, without feeling their work is being attacked on a personal level. Changes need to be made to the auditing process before irreparable damage is done. Outside auditing firms that promise to cut the fat out of attorneys' bills instead chop into the very heart of the insurance defense bar, which has left insureds in a critical condition.

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198. *See* Ricker, *supra* note 26, at 65.

199. *See* Martin, *supra* note 2, at 355.

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